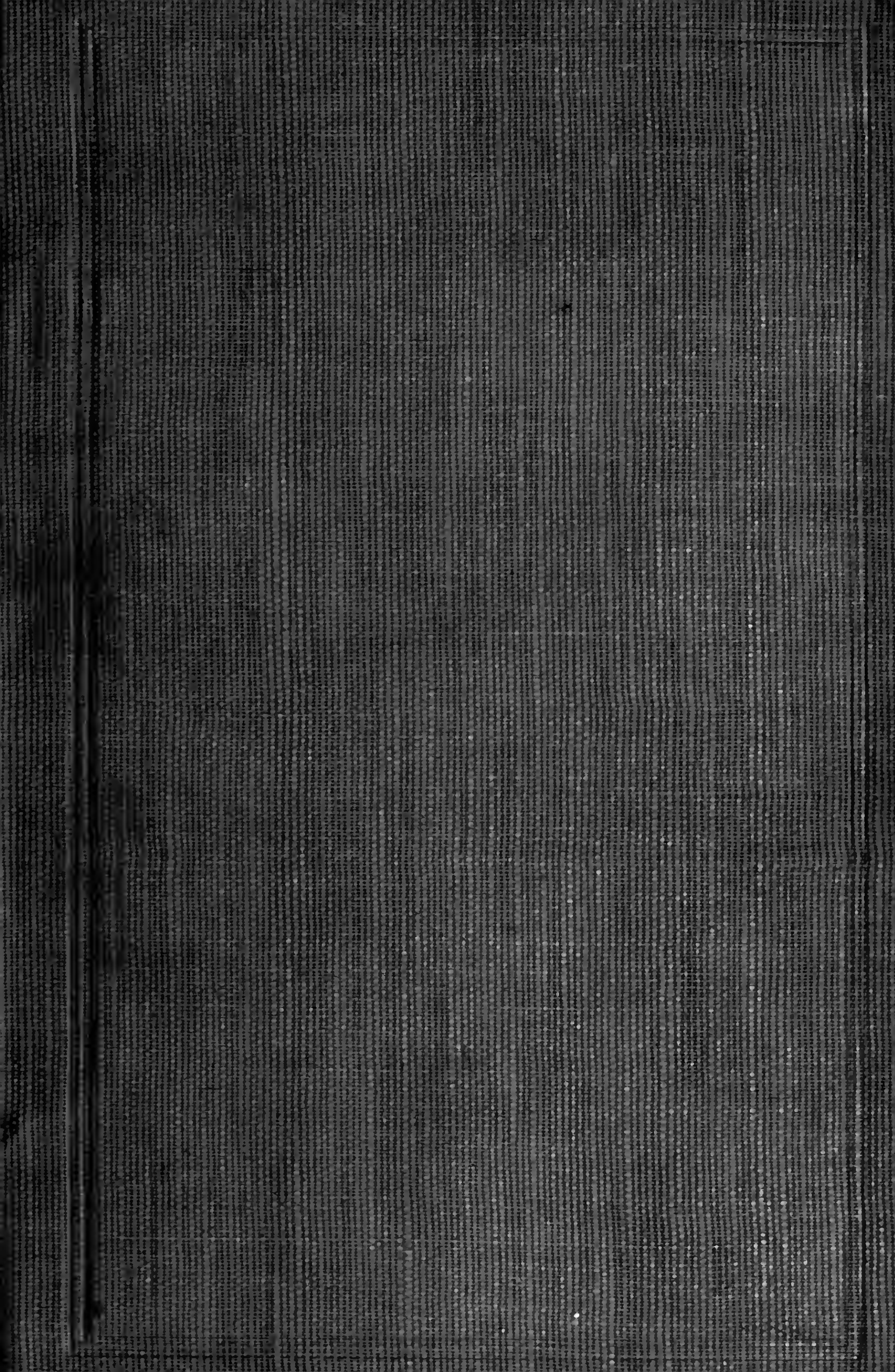

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No. 1322

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

WILLIAM PARDY AND ALBERTINE HASLER,

Appellants,

vs.

J. D. HOOKER COMPANY (A CORPORATION),

Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States Circuit Court for the Southern District of California.

FILED

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THE FILMER BROS. CO. PRINT, 424 SANSOME ST., S. F.

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In the United States Circuit Court of Appeals, for the Ninth Circuit.

WILLIAM PARDY et al.,
Appellants,
vs.
J. D. HOOKER COMPANY,
Appellee.

Stipulation as to Printing Record.

It is hereby stipulated that in printing the transcript on appeal in the above-entitled action the clerk shall omit from said printed transcript and shall not print the following portions of said written transcript, but either party shall have the right to refer to the written transcript as to said omitted matters, to wit:

All matter found on the following pages of said written transcript, to wit:

II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, 1, 8, 9, 10, 17, 18, 19, 20, 21, 24, 25, 26, 51, 77, 78, 79, 80, 81, 82, 83, 100, 126, 135, 140, 146, 178, 179, 180, 181, 182, 183, 184, 217, 220, 221, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233; also all matter found on Complainants'

Exhibits 5 to 29, inclusive, which is included in the heading of said exhibits before the date thereof and being the following matter: "P. O. Box 913, Telephone 530, Los Angeles Pipe Manufactory, J. D. Hooker & Co., Manufacturers of Riveted Sheet Iron Water Pipe and Dealers in Wrought Gas and Water Pipe and Pipe Fittings, works San Fernando & R. R. Sts., and Magdalena Avenue," said matter occurring on pages 186, 187, 188, 189, 191, 192, 193, 194, 195, 196, 197, 199, 200, 201, 204, 206, 208, 210, 211, 212, 214, 216, 219, and all matter occurring on the following pages after the word "(Endorsed)" on each of said pages, to wit: 185, 186, 187, 188, 190, 191, 192, 193, 194, 195, 196, 198, 199, 200, 202, 203, 205, 207, 209, 210, 211, 213, 215, 216, 218 and 219.

Dated March 30, '06.

G. E. HARPHAM and

HAZARD & HARPHAM.

Solicitors for Appellants.

J. W. McKINLEY,

Solicitor for Appellee.

[Endorsed]: 1322. United States Circuit Court of Appeals. William Pardy et al., vs. J. D. Hooker Co. Stipulation Relating to Printing Transcript. Filed Apr. 2, 1906. F. D. Monckton, Clerk.

United States Circuit Court for the Southern District of California, Southern Division Thereof.

IN EQUITY.

WILLIAM PARDY and ALBERTINE HASLER,
Complainants,

vs.

J. D. HOOKER COMPANY (a Corporation),
Defendant.

Bill of Complaint.

To the Honorable Judges of the Circuit Court of the United States, in and for the Southern District of California.

1.

William Pardy and Albertine Hasler, citizens of the State of California, bring this their bill of complaint against the J. D. Hooker Company, a corporation organized under the laws of the State of California, and having a place of business at Los Angeles, in the county of Los Angeles, State of California, and say:

2.

That prior to the 20th day of August, 1889, one George Pardy was the true, original and first inventor of certain new and useful improvements in riveting machines not known or used by others in this country, and not

patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, and not in public use or on sale for more than two years prior to the hereinafter mentioned application for a patent therefor, and which had not been abandoned prior to said application hereafter mentioned.

3.

That after the making of said invention of said riveting machines said George Pardy died testate at the city and county of San Francisco, State of California, and at the time of his death was a resident thereof. That after the death of said George Pardy such proceedings were had in the Superior Court of the City and County of San Francisco, State of California, in the Matter of the Estate of said George Pardy, that by a decree of said Court, duly made and given, the last will of said George Pardy was duly admitted to probate and letters testamentary in accordance with the provisions of said will were duly issued to William Pardy, the executor of said last will and testament of said George Pardy, deceased, a duly authenticated copy of said will, together with a copy of the decree admitting the same to probate is ready to be produced in court, together with a copy of said letters testamentary. That by the provisions of the will of said George Pardy, after devising certain specific property in said will mentioned, and which did not include the said invention hereinbefore referred to, he bequeathed and devised the remainder of his property which included the said invention here-

inbefore referred to to William Pardy one-half, to John Pardy, one-eighth, and to Albertine Hasler, three-eighths.

4.

That while said letters testamentary were in full force and effect and after said William Pardy had duly qualified thereunder, and had become the duly qualified and acting executor of the last will and testament of said George Pardy, deceased, and on the 16th day of December, 1889, the said William Pardy, as such executor did duly and regularly file in the patent office of the United States an application to the Commissioner of Patents, praying for the issuance of letters patent of the United States for the said invention of said George Pardy, and after proceedings duly and regularly had and taken in the matter, to wit, on the 19th day of August, 1890, letters patent of the United States bearing date on that day and numbered 434,677, were granted, issued and delivered to said William Pardy, as executor of the estate of George Pardy, deceased, for the benefit and use of the devisees under the will of said George Pardy, deceased, whereby there was granted to them, their heirs and assigns for the full term of 17 years from said last-mentioned date, the exclusive right to make, use and vend said invention throughout the United States of America, and the Territories thereof, as by said letters patent ready to be produced in court will fully and at large appear.

5.

That in the matter of the estate of said George Pardy,

deceased, on the 26th day of February, 1890, a decree of distribution was duly made and given by said Superior Court of the city and county of San Francisco, whereby there was distributed to William Pardy an undivided one-half interest, in the aforesaid invention and the letters patent to be obtained therefor, and to John Pardy a one-eighth interest, and to Albertine Hasler a three-eighths interest, a duly certified copy of which said decree of distribution is ready to be produced in court.

6.

That on the second day of May, 1903, John Pardy duly sold, assigned and transferred unto William Pardy all his right, title and interest in and to the aforementioned letters patent, 434,677, bearing date August 19th, 1890, for a pipe riveting machine, together with all rights of action which had accrued to him by reason of the infringement of said letters patent, which said assignment is hereby ready to be produced in court, and ever since said day, said William Pardy has been and now is the owner of an undivided five-eighths interest in and to the said letters patent before mentioned, and of the right to recover damages for the infringement thereof, and since the said decree of distribution said Albertine Hasler has been and now is the owner of the other undivided three-eighths of said letters patent.

7.

That said letters patent 434,677 were issued in due form of law under the seal of the patent office of the United States, signed by the Secretary of the Interior,

and countersigned by the Commissioner of Patents of the United States, and prior to the issuance thereof, all proceedings were had and taken which were required by law to be had and taken prior to the issuance of the letters patent for new and useful inventions.

8.

That on or about the 13th day of February, 1895, the defendant, the J. D. Hooker Company, was organized under the laws of the State of California, and ever since said time has been and now is a corporation organized under the laws of the State of California, and having its principal place of business at the city of Los Angeles, county of Los Angeles, and State of California.

9.

Your orators further show on information and belief that the defendant, well knowing the premises, and without the license or consent of your orators, and since the 13th day of February, 1895, and before the commencement of this suit within the Southern District of California, and in the Southern Division thereof, has unlawfully and wrongfully used one or more pipe riveting machines each containing and embracing the said invention described and patented in and by the said letters patent sued on herein and has infringed upon the exclusive rights secured to your orators by said letters patent, and has made and realized large profits and advantages therefrom, but to what amount your orators are ignorant and cannot set forth, and they pray that

the defendant may be required to make a disclosure of all such gains and profits.

10.

And your orators further show that they have requested the defendant to cease and desist from infringing upon the rights secured to them by said letters patent, but the defendant refused, and neglected to comply with said request and is now using or causing to be used one or more pipe riveting machines containing said patented invention and threatens to continue so to do, and unless restrained by this Court will continue to make use and sell the same.

11.

Forasmuch as your orators can have no adequate relief except in this court, and to the end therefore that the defendant may, if it can, show why your orators should not have the relief prayed and may make a full disclosure and discovery, but not upon oath, an answer under oath being hereby expressly waived, of all matters aforesaid and according to the best of its knowledge, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged, and especially to the following number specific interrogatories:

1. Whether since February 13th, 1895, the defendant has made or used or sold, or caused to be made or used or sold anywhere in the United States of America, any pipe riveting machines containing or employing the said

improvement or operating in the manner described and claimed in the said letters patent; and if yes, how many of such pipe riveting machines it has so made, or used, or sold?

2. If the defendant answers that it has made or used, or sold pipe riveting machines containing said patented improvement, state the sizes of said machines, to whom sold, and at what price and when, also state how much pipe the defendant has manufactured by the use of each of said machines, and what profit it has made by the use of each of said machines.

12.

And your orators pray that the defendant may be decreed to account for and pay over to your orators the income or profits thus unlawfully derived from the violation of your orators' rights as aforesaid, and that said amount be trebled and that it be restrained from any further violation of said rights, and that your Honors may grant a writ of injunction issuing out of and under the seal of this Honorable Court, perpetually and enjoining and restraining said defendant, its clerks, agents and workmen from any further construction, sale, or use in any manner of any pipe riveting machines containing said patent improvement or any part thereof in violation of your orators as aforesaid.

That your Honors, upon rendering the decree above prayed for may assess or cause to be assessed in addition to the profits to be accounted for by the defendant as aforesaid, a sum equal to three times the amount of

such assessment under the circumstances of the willful and unjust infringement by defendant as herein set forth.

May it please your Honors to grant unto your orators not only a writ of injunction comformable to the prayers of this bill, but also a writ of subpoena of the United States of America, directed to said J. D. Hooker Company, commanding it on a day certain to appear and answer unto this bill of complaint and to abide by and perform such order and decree in the premises as to the Court shall seem proper by the principles of equity and good conscience.

And your orators will ever pray.

WM. PARDY,
ALBERTINE HASLER,
Complainants.

HAZARD & HARPHAM,
Solicitors for Complainants.

G. E. HARPHAM,
Of Counsel.

United States Circuit Court for the Southern District of California, Southern Division Thereof.

IN EQUITY.

WILLIAM PARDY and ALBERTINE HASLER,
Complainants,
vs.
J. D. HOOKER COMPANY (a Corporation),
Defendant.

Answer.

Answer of the J. D. Hooker Company to the bill of complaint of William Pardy and Albertine Hasler.

This defendant, now and at all times saving and reserving unto itself all benefit and advantage of exception to the many errors, uncertainties, imperfections and insufficiencies in the complainants' said bill of complaint contained, for answer thereto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer to, answering, says.

I.

This defendant admits that on or about the 3d day of February, 1895, it was organized under the laws of the State of California, and ever since said time has been and now is a corporation organized under the laws of the State of California, and having its principal place

of business at the city of Los Angeles, county of Los Angeles, and State of California.

II.

That this defendant does not know, and has not been informed, save by said bill of complaint, whether George Pardy, the individual named in paragraph III of said bill of complaint, died intestate at the city and county of San Francisco, State of California, and at the time of his death was a resident thereof.

And does not know and has not been informed, except by said bill of complaint, whether, after the death of said George Pardy, the alleged will of said Pardy was by decree of the Superior Court of the City and County of San Francisco, State of California, duly admitted to probate, and letters testamentary, in accordance with the provisions of said alleged will, were issued to said William Pardy, the executor of said alleged will.

And does not know and has not been informed, except by said bill of complaint, whether by the provisions of said alleged will, George Pardy, after devising certain specific property in said alleged will mentioned, and which did not include said alleged invention in said bill of complaint before mentioned, bequeathed and devised the remainder of his property, including said alleged invention, to William Pardy, one-half, to John Pardy one-eighth, and to Albertine Hasler three-eighths.

And it therefore leaves the complainants to make such proof thereof as they may be advised is material and as they may be able to make.

III.

That this defendant does not know and has not been informed, except by said bill of complaint, whether, while said alleged letters testamentary were in full force and effect, and after said William Pardy had duly qualified thereunder and become the duly qualified and acting executor of said alleged will of George Pardy, deceased, and on the 16th day of December, 1889, the said William Pardy, as such alleged executor did duly and regularly file in the patent office of the United States, an application to the Commissioner of Patents, praying for the issuance of letters patent of the United States for the said alleged invention of said George Pardy, and after proceedings duly and regularly had and taken in the matter, to wit, on the 19th day of August, 1890, letters patent of the United States, bearing date on that day and numbered 434,677, were granted, issued and delivered to said William Pardy, as executor of the estate of George Pardy, deceased, for the benefit and use of the devisees under the will of said George Pardy, deceased, whereby there was granted to them, their heirs and assigns, for the full term of 17 years from said last-mentioned date, the exclusive right to make, use and vend said alleged invention throughout the United States of America, and the territories thereof; and it therefore leaves the complainants to make such proof thereof as they may be advised is material, and as they may be able to make.

IV.

That this defendant does not know, and has not been informed, except by said bill of complaint, whether any decree of distribution was duly made and given by said Superior Court of the City and County of San Francisco, whereby there was distributed to said William Pardy an undivided one-half interest in the aforesaid alleged invention and the letters patent to be obtained therefor, and to John Pardy a one-eighth interest, and to Albertine Hasler a three-eighths interest; and it therefore leaves the complainants to make such proof as they may be advised is material, and as they may be able to make.

V.

That this defendant does not know and is not informed, except by said bill of complaint, whether said John Pardy sold, assigned and transferred to William Pardy all his alleged right, title and interest in and to the aforementioned letters patent 434,677 for a pipe riveting machine, together with all rights of action which had accrued to him by reason of the infringement of said letters patent; nor whether since said alleged assignment, said William Pardy has been and now is the owner of an undivided five-eighths interest, and said Albertine Hasler has been and now is the owner of the other undivided three-eighths, of said letters patent; and it therefore leaves the complainants to make such proof thereof as they may be advised is material, and as they may be able to make.

VI.

This defendant denies that the said George Pardy was the true, original and first inventor of the alleged invention of improvements in riveting machines; and states upon information and belief that prior to the death of said George Pardy, to wit, in or about the year 1888, the said George Pardy was employed as a mechanic by J. D. Hooker, at the city of Los Angeles aforesaid, to construct experimental machines embodying certain improvements in riveting machines invented by said J. D. Hooker, and then and there divulged and described by said Hooker to said Pardy. That it was then and there agreed by and between them that said J. D. Hooker should pay for all materials necessary for the construction of said machines, and should pay the said George Pardy for his services in embodying said invention in said machines, and that in consideration thereof, the said J. D. Hooker should become and be entitled to all the benefits of said services of said Pardy and become and be exclusive owner of the said experimental machines. That, thereafter and in pursuance of said agreement, the said George Pardy did construct experimental machines embodying said invention of said J. D. Hooker. That upon the completion thereof the said J. D. Hooker suggested certain material additions thereto, and changes therein, some of which were made by said George Pardy and some by others. That such experimental machines were made by or under the direction of said Pardy, all embodying the said invention, additions and changes, made by said J. D. Hooker.

That said J. D. Hooker paid for the materials necessary for the construction of said experimental machines and for the said additions thereto; and paid the said George Pardy in full for all his said services in connection with the making and altering of said experimental machines, and said J. D. Hooker thereupon became and was and now is entitled to all the benefits derived from said services, and became and was and now is the sole owner of said experimental machines. That said William Pardy, acting as executor of said George Pardy, deceased, seeking surreptitiously to appropriate said invention, or so much thereof as is embraced in the claims of the patent sued on, unjustly and unlawfully filed in the patent office of the United States an application for said patent, wherein he falsely alleged the said George Pardy to be the inventor thereof, and thereafter he surreptitiously and unjustly obtained the patent sued on for that which was in fact invented by said J. D. Hooker, who was using reasonable diligence in adapting and perfecting said invention.

VII.

This defendant, further answering said bill of complaint, says that subsequent to the making of said machines, as hereinbefore in paragraph VI hereof set forth, said J. D. Hooker, with the full knowledge of said George Pardy, had several other machines, similar to said first machines, constructed, and also one or more machines embodying some of the features of said machine; and continuously used all of said machines, with the full knowledge of, and without any objection by,

the said George Pardy. That after the incorporation of this defendant, said J. D. Hooker gave express permission to the defendant to use the said machines, and this defendant has, from time to time used the same; but it is unable to state how much piping it has made therewith.

And this defendant, further answering said bill of complaint, says that the machines hereinbefore mentioned, are the only such machines used by said defendant, and it has not caused or authorized the making or use of any other such machines.

VIII.

This defendant further denies that any gains or profits of any sort whatever have accrued, or have been received by it, to which the complainants are entitled, or that they are entitled to any gains or profits, by reason of said alleged infringement, or that any gains and profits would have accrued to the complainants but for said alleged infringement; and also denies that they have any claim whatever to damages by reason of such alleged infringement or any other infringement, or that because of the alleged wilful nature of the alleged infringement, the damages be increased threefold.

And this defendant denies that the complainants have any cause whatever to invoke this Honorable Court to compel the defendant, by a decree, to account for and pay over to the complainants any income or profits, or any sum whatever by reason of said alleged infringement; or to enjoin the said defendant from the further

construction, sale or use if any pipe riverting machines containing said patented improvements or any part thereof in violation of the alleged rights of said complainants.

Wherefore, the defendant having answered fully to the said bill of complaint, in so far as it is advised, the same is material and necessary to be answered unto, deny that the complainants have any just claim to the relief prayed in the same bill of complaint, or to any relief whatever; it prays the same advantage of its aforesaid answer as if it had pleaded and demurred to the said bill of complaint, and prays to be hence dismissed with its reasonable charges in this behalf most wrongfully sustained.

J. D. HOOKER COMPANY,
By JNO. D. HOOKER,
President.
J. W. McKINLEY,
Solicitor and Counsel for Defendant.

In the Circuit Court of the United States, for the Southern District of California, Southern Division Thereof.

IN EQUITY.

WILLIAM PARDY and ALBERTINE HASLER, Complainants, vs. J. D. HOOKER COMPANY (a Corporation), Defendant.	No. 1125

Decree.

This cause having on the 14th day of December, 1905, come on to be heard upon the pleadings, proceedings and proofs herein filed on behalf of both parties, and after hearing Hazard & Harpham, Esqs., counsel for complainants, and J. W. McKinley, Esq., and Alexander Van Cott, Esq., counsel for defendant, and after due proceedings, it is upon consideration:

Ordered, adjudged and decreed as follows:

I.

That George Pardy, deceased, named in United States patent letters No. 434,677 set forth in the bill herein, was not the first true and original inventor of the new and useful improvement in riveting machines described and named in said letters patent.

II.

That the said letters patent No. 434,677 set forth in the bill herein issued to William Pardy as executor of the last will and testament of George Pardy, deceased, are void in law.

III.

That the complainant's bill be and is hereby dismissed.

It is further ordered, adjudged and decreed that the defendant have and recover from the complainants its reasonable costs and disbursements in this cause, taxed in the sum of $75.50 dollars, and that execution issue therefor.

OLIN WELLBORN,
Judge.

Decree entered and recorded December 1st, 1905.

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy.

[Endorsed]: No. 1125. In the Circuit Court of the United States, Southern District of California, Southern Division. In Equity. William Pardy et al., Complainants, vs. J. D. Hooker Company. Final Decree. Filed Dec. 21, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

In the Circuit Court of the United States, Southern District of California, Southern Division.

WILLIAM PARDY et al., Complainants, vs. J. D. HOOKER COMPANY (a Corporation), Defendants.	No. 1125.

Depositions.

Be it remembered, that pursuant to the stipulation hereunto annexed, and on the fourth day of February, 1905, at the office of Frank L. Owen, Esq., rooms 804 and 805 Mills Building, in the city and county of San Francisco, State of California, before me, Frank L. Owen, a notary public in and for said city and county, duly appointed to administer oaths, etc., personally appeared the complainants in the above-entitled cause and their counsel, G. E. Harpham, Esq., also Purcell Rowe, Esq., representing J. W. McKinley, Esq., counsel for the defendants.

Mr. Rowe stated that he was in receipt of a telegram from Judge McKinley to the effect that he was detained by a landslide on the Southern Pacific Railroad, and was prevented from being present at this hour; that Judge McKinley requested, in said telegram, that the taking of the depositions be postponed until Monday, February 6, at ten o'clock A. M.

By consent of counsel for complainants a continuance was granted as requested.

The witnesses were instructed to be present without further notice.

Monday, February 6, 1905, 10 A. M.

Pursuant to adjournment had February 4th, 1905, the several parties met on the above date at the office of Frank L. Owen, Mills Building, rooms 804 and 805.

Present, the complainants and their counsel, G. E. Harpham, Esq.; also J. W. McKinley, Esq., representing the defendant.

It is stipulated that the testimony of the several witnesses be taken down in shorthand by Brainard C. Brown, and by him reduced to typewriting.

Deposition of WILLIAM PARDY, witness called on behalf of complainants, sworn, examined, testified as follows:

(By Mr. HARPHAM.)

Q. 1. Mr. Pardy, were you acquainted with George Pardy in his lifetime?

A. Certainly; he was my brother.

Q. 2. You are the William Pardy, are you, who is mentioned as the executor of George Pardy, deceased?

A. I am.

Q. 3. As executor of his estate did you go through his papers to see what papers he left?

A. I did.

Q. 4. Will you please look at this bank book of Wells,

(Deposition of William Pardy.)

Fargo & Co.'s bank in account with George Pardy? Did you find this book among his papers? A. I did.

Q. 5. You are acquainted with your deceased brother's handwriting, are you? A. Yes, sir.

Q. 6. Please look at this check, dated May 11, 1883, Number 6.

A. I recognize that as a check drawn by my brother. It is his own handwriting.

Q. 7. Please look at this stub and state in whose handwriting the stubs in that book are.

A. This is a check-book of Wells-Fargo's bank, with the stubs corresponding to the checks.

Q. 8. You have examined these stubs, have you? In whose handwriting do those stubs appear to have been made? A. In my brother George's.

Mr. HARPHAM.—I will now offer in evidence this bank-book and these bank stubs showing checks to have been drawn on the same bank, and this check No. 6, of date May 11, 1888.

Mr. McKINLEY.—The defendant objects to the introduction of the papers offered upon the ground that they are irrelevant and immaterial, not tending to establish any issue in this case; incompetent in that they are simply the declarations of the decedent in his own interest, and not the best evidence. (The bank-book is marked Exhibit No. 1; the stub-book is marked Exhibit No. 2, and check is marked Exhibit No. 3.)

(Deposition of William Pardy.)

Mr. HARPHAM.—It is understood that no objection is to be raised to the manner of proving the account of George Pardy with Wells, Fargo & Co's. bank?

Mr. McKINLEY.—Yes, in so far as that I stipulate that it shall have the same effect as if the officers of the bank were present, testifying to the matters which are contained on their books, purporting to be duplicated here.

Q. 9. (By Mr. HARPHAM.) This is a book of original entry.

Mr. McKINLEY.—Yes, it is the book of the bank, as far as that is concerned.

Q. 9. (By Mr. HARPHAM.) Mr. Pardy, did you have any conversation with Mr. J. D. Hooker in reference to this pipe riverting machine? If so, state when you had that conversation, and what it was.

A. According to my recollection the conversation took place some time in September following my brother's death in 1889, as executor of the estate, and in my endeavor to settle with Mr. Hooker the questions of Mr. Hooker's relations with my brother, George Pardy came up—

Mr. McKINLEY.—I object to the witness giving conclusions. I am perfectly willing that he should testify to anything that occurred. But I object to any conclusions that happened between them. I move to strike out the statement that he made an endeavor to settle.

(Deposition of William Pardy.)

Q. 10. (By Mr. HARPHAM.) At any rate you had a meeting with him?

The WITNESS.—(To Mr. McKINLEY.) Do you object to the word "settlement?"

Mr. McKINLEY.—I object to any statement as to any conclusions. From my standpoint all you can do is to go on and state the actual personal occurrences with Mr. Hooker.

Q. 11. (By Mr. HARPHAM.) You state that you did have an interview with him in September following the death of your brother in 1889? Was anything said about this pipe riveting machine at that interview?

A. Yes.

Q. 12. State what was said.

A. Well, I have got to repeat what I have already said. Or else the words will stand hardly understandable.

Q. 13. Go ahead and state what was said, and then you can make the explanations afterwards, as to what led up to it.

A. In the controversy arising I stated to Mr. Hooker that there was two ways of settlement with the estate; either to pay a fair and proper compensation to it for the riveting machine spoken of, or to allow the estate to take out a patent upon it.

Mr. McKINLEY.—The defendant moves to strike out the statement of the witness that those matters were

(Deposition of William Pardy.)

said in the controversy arising, upon the ground that it is a conclusion of the witness and incompetent.

Q. 14. (By Mr. HARPHAM.) What reply did Mr. Hooker make in relation to the settlement that you have just detailed, if any?

A. He replied, "You can take out the patent."

Q. 15. What led up to this conversation between you?

Mr. McKINLEY.—That is objected to as calling for a conclusion of the witness, not calling for a statement of facts.

Mr. HARPHAM.—Then I will change the question.

Q. 16. State how you happened to have this conversation with Mr. Hooker?

(The same objection.)

A. Shall I state it?

Q. 17. Yes.

A. From George Pardy, while living, and from certain letters in the possession of the estate, written to him by J. D. Hooker, I understood that the question—

Mr. McKINLEY.—The defendant objects to the statement of the witness as incompetent and hearsay; also moves to strike out what has already been stated as a statement of his conclusion, as hearsay and incompetent; also as a statement of the contents of writing without any evidence of the writing being lost.

(Deposition of William Pardy.)

Q. 18. (By Mr. HARPHAM.) Go ahead. By the letters you mean the letters written by J. D. Hooker?

A. Yes, George Pardy. (Continuing.) —of the future possession and control of the riveting machine was unsettled—

Mr. McKINLEY.—(Interrupting.) Defendant moves to strike out the statement made since the last objection on the ground that it is immaterial; that it is an endeavor by the witness to explain a written document and to state the contents thereof as hearsay and not the best evidence.

Q. 19. (By Mr. HARPHAM.) Go on.

A. (Continuing.)—and wishing to determine the matter I made the proposition that he should control it for a fair monied compensation, or the estate should be allowed to take out the patent upon the machine without his opposition.

Q. 20. Where was Mr. Hooker at this time?

A. In room 19 of the Safe Deposit Building, corner of California and Montgomerty street, San Francisco.

Q. 21. Where are the letters that you have referred to as being letters written by J. D. Hooker to your brother, George Pardy?

A. In the possession of my attorneys.

Q. 22. What did you do with them?

A. The letters?

Q. 23. Yes.

(Deposition of William Pardy.)

A. Why, I mailed them to the firm of Hazard & Harpham, Los Angeles, California.

Mr. HARPHAM.—These letters that the witness refers to were all introduced in evidence and are now in the possession of the Special Examiner at Los Angeles, California, who took the testimony at Los Angeles.

Mr. McKINLEY.—I admit that that is the fact, upon the statement of Mr. Harpham.

Q. 24. (By Mr. HARPHAM.) And you say that it was from those letters that you got this understanding that the question of the future control of the patent riveting machine was an open question between your brother at the time of his death, and Mr. Hooker?

Mr. McKINLEY.—Defendant objects to that question as immaterial and irrelevant; calling for a conclusion of the witness; calling for hearsay testimony; calling for an interpretation of a letter, and incompetent.

A. Yes, I learned this from the letters and from my brother before his death.

Mr. McKINLEY.—Defendant moves to strike out the whole statement as incompetent and stating a conclusion of the witness, and as an interpretation of the letters, and hearsay; and also specially moves to strike out the statement that the witness learned it from his brother, as incompetent, as the conclusion of the witness and as hearsay, and as a self-serving declaration of the decedent.

(Deposition of William Pardy.)

Q. 25. (By Mr. HARPHAM.) Mr. Pardy, will you please look at this document and state in whose handwriting it is?

A. This document is in the handwriting of my brother, George Pardy.

Mr. HARPHAM.—The document referred to is entitled "Specification of a riveting machine." It is offered in evidence, to be attached to the deposition.

(Marked Exhibit No. 4.)

Mr. McKINLEY.—The defendant objects to the introduction of the patent on the ground that it is irrelevant and immaterial, does not tend to establish any issue in the case; no proper foundation laid; incompetent.

Q. 26. (By Mr. HARPHAM.) In looking over the papers left by your brother did you find any sketches of this pipe riveting machine among the papers that he left? A. I did.

Q. 27. Look at this sketch and state whether or not you have ever seen that before. (Showing.)

A. I have. As executor of the estate it came into my possession.

Mr. HARPHAM.—I offer that in evidence, to be attached to the depositions.

(The same objection.)

(Marked Exhibit No. 5.)

Q. 27. Look at this letter and state in whose handwriting it is?

(Deposition of William Pardy.)

A. That is in my brother's handwriting.

Mr. HARPHAM.—I offer this letter in evidence, to be attached to the depositions.

Mr. McKINLEY.—Defendant objects to it as irrelevant and immaterial, not tending to establish any issue in this case; incompetent, and a self-serving declaration of the decedent.

(Marked Exhibit No. 6.)

Cross-examination.

(By Mr. McKINLEY.)

XQ. 1. Mr. Pardy, when did you first meet J. D. Hooker?

A. It is not in my recollection that I met J. D. Hooker prior to our meeting in room 19, Safe Deposit Building, San Francisco.

XQ. 2. How long was he there on that occasion?

A. An hour or more.

XQ. 3. Did you ever discuss the matter with him upon any other occasion? A. No.

Q. 4. Did you have any correspondence with him?

A. I can't remember.

XQ. 5. You have not now in your possession any letters from Mr. Hooker or any copies of letters written by you to him?

A. It has passed my recollection.

XQ. 6. You do not now know of the existence of any

(Deposition of William Pardy.)

letters written by Mr. Hooker to you, or of copies of letters written by you to Mr. Hooker?

A. On what subject?

XQ. 7. In connection with this matter; in connection with this machine or patent.

A. I do not.

Q. 8. When did you first learn that he was operating a machine in his works other than the ones put in during your brother's lifetime?

A. I can't give you the specific date.

XQ. 9. About how soon after you applied for a patent was it? I will put the question in this way: when did you first hear that Mr. Hooker had a third machine in his works, and was using it, fixing the date with reference to the time that you applied for a patent, as near as you can? About what year was it, Mr. Pardy?

A. I don't want to guess at it.

XQ. 10. I will ask this question: When did you first learn that J. D. Hooker or the J. D. Hooker Company was using a third machine of the kind described in the patent here?

A. About the latter part of 1893; previous to November, 1893.

XQ. 11. Who was present at the conversation of Mr. Hooker which you have detailed here, Mr. Pardy?

A. Miss A. Hasler.

XQ. 12. Was anyone else present?

A. Not to my recollection.

WM. PARDY.

(Deposition of Albertine Hasler.)

Subscribed and sworn to before me this 13th day of February, 1905.

[Seal] FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California.

Deposition of ALBERTINE HASLER, a witness called on behalf of complainant, sworn, examined, testified as follows:

(By Mr. HARPHAM.)

Q. 1. Miss Hasler, you are one of the complainants in this case, are you? A. Yes.

Q. 2. Did you ever meet Mr. J. D. Hooker in relation to this pipe riveting machine? If so, when and where?

A. Yes; when he came to see Mr. Pardy, I was sorting papers belonging to the estate, and Mr. Hooker came in at that time.

Q. 3. Were you present at the time that Mr. William Pardy and Mr. Hooker had a conference in the Safe Deposit building? A. Yes, I was.

Q. 4. What was said by Mr. Pardy and what was said by Mr. Hooker, as near as you recollect it? What was said at that conversation relating to this pipe riveting machine matter?

A. Mr. Pardy said to Mr. Hooker that there were two ways of settling this; one was for Mr. Hooker to pay to the estate of George Pardy a certain amount for his labor, invention, etc., and the other was that we

(Deposition of Albertine Hasler.)

would take out a patent; and Mr. Hooker replied, "Get the patent."

Q. 5. Please look at this check marked Complainant's Exhibit No. 3 and state whether or not you have ever seen that check before?

A. Yes, I have seen it before.

Q. 6. When did you see that check?

A. When I had a conversation myself, with Mr. Hooker, I showed him this check and I showed him some bills that Mr. George Pardy had paid for construction of the first machine.

Mr. McKINLEY.—Defendant moves to strike out the statement of the witness that Pardy had paid certain bills, on the ground that it is a conclusion and hearsay.

Q. 7. (By Mr. HARPHAM.) In whose handwriting is that statement? (Showing.)

A. That is in my handwriting.

Q. 8. Is that a statement of the bills that you had at that time, at the time that you had this conversation with Mr. Hooker?

(Objected to as incompetent and immaterial and as calling for hearsay testimony.)

A. Yes.

Q. 9. Did you have any conversation with Mr. Hooker, yourself, in relation to this statement of bills paid by Mr. Pardy on Mr. Hooker's account in relation to this check for $100?

(Deposition of Albertine Hasler.)

A. I showed him the bills that had been paid by Mr. Pardy, and I showed him that check, and Mr. Hooker said he didn't know anything about the bills. He didn't say anything about the check.

Q. 10. In whose handwriting is that pencil memorandum on that check? (Showing witness exhibit No. 3.)

A. I don't know. Maybe Mr. Pardy's. I know Mr. Pardy let him have that money.

Mr McKINLEY.—Defendant moves to strike out that last statement as not responsive, hearsay, and a conclusion of the witness.

Q. 11. (By Mr. HARPHAM.) Did you say that pencil memorandum on the back of the check, "borrowed money," was in the handwriting of George Pardy?

A. No; I dare say it is in Mr. William Pardy's. I didn't know who write it. I didn't notice that.

Q. 12. Now, you state that you know that Mr. George Pardy loaned Mr. Hooker this money. How do you know?

A. Well, when Mr. Hooker used to come to the city Mr. Pardy always was here, and he told me of it, and he said that time that "Mr. Hooker was short and I loaned him a hundred dollars."

Mr. McKINLEY.—Defendant moves to strike out the statement of the witness as irrelevant and immaterial, a conclusion and hearsay; and also the previous statement, on the ground that it is not shown to be based

(Deposition of Albertine Hasler.)

on the knowledge of the witness; that the statement rests upon hearsay.

Q. 13. Is there anything else, Miss Hasler, that you know relating to this matter, from any conversation that you had with Mr. Hooker about that?

A. Well, he told me that he paid $150 to Mr. Pardy for his services, but I knew he did not, and so I shook my head.

Mr. McKINLEY.—Defendant moves to strike out the answer of the witness wherein she states that she knew that he did not pay the $150, as hearsay, incompetent and immaterial.

Q. 14. (By Mr. HARPHAM.) Any other statement that Mr. Hooker may have made to you in relation to the matter, is what I asked for. Not any statements that Mr George Pardy made, but simply the statements of Mr. Hooker, himself.

A. Well, later on in the conversation he said that "Mr. Pardy wanted nothing—absolutely nothing." And that was his suggestion.

Cross-examination.

XQ. 1. (By Mr. McKINLEY.) Your statement as to knowledge with regard to Mr. Hooker making monthly payments to Mr. Pardy is based upon a statement of Mr. Pardy, to you, is it?

A. No, Mr. Hooker said he paid him $150, but I knew from Mr. George Pardy that he did not pay him anything.

(Deposition of Albertine Hasler.)

XQ. 2. Your knowledge of that matter was based entirely upon the statements of Mr. Pardy to you, Miss Hasler?

A. Yes, excepting what Mr. Hooker said.

XQ. 3. Excepting what Mr. Hooker said.

A. Yes.

Mr. McKINLEY.—Defendant moves to strike out the statements of the witness as to her knowledge that Mr. Hooker did not pay Mr. Pardy, as hearsay.

XQ. 4. What business was Mr. Pardy engaged in, Miss Hasler?

A. He was a patent attorney and a mechanical engineer.

XQ. 5. Was he a man of means in May, 1888?

A. I dare say he had some money.

XQ. 6. Any considerable amount?

A. Well, I know he had a bank account. I don't know exactly how much he had.

XQ. 7. What was the date of his death?

A. August 14, 1889.

XQ. 8. How much estate did he leave?

A. I really can't tell you. There was a great many people owing him money.

XQ. 9. About what did he have in property?

A. I can't tell you.

XQ. 10. About what was there administered upon in the course of the estate? You were the executrix, were you not? A. Oh, no.

(Deposition of Albertine Hasler.)

XQ. 11. Were you a legatee? A. Yes.

XQ. 12. How much did you receive from it?

A. I don't remember. Some hundreds of dollars.

XQ. 13. Some hundreds? A. Yes.

XQ. 14. Over a thousand dollars, was it?

A. No, I don't think so.

XQ. 15. And you got half the estate?

A. No, I did not.

XQ. 16. What proportion did you get?

A. I got three-eighths.

ALBERTINE HASLER.

Subscribed and sworn to before me this 13th day of February, 1905.

[Seal] FRANK L. OWEN,

Notary Public, State of California, City and County of San Francisco.

EDWARD E. OSBORN, a witness called on behalf of complainants, sworn, examined, testified as follows:

(By Mr. HARPHAM.)

Q. 1. Mr. Osborn, what is your business?

A. I am a solicitor of patents.

Q. 2. How long have you followed that business, and where?

A. Ten years in New York City, and upwards of twenty years in San Francisco, California.

Q. 3. Were you acquainted with George Pardy in his lifetime?

(Deposition of Edward E. Osborn.)

A. I was acquainted with George Pardy.

Q. 4. What was his business at the time of his death?

A. He was a solicitor of patents, and acted as a patent expert, also.

Q. 5. Please look at the original letters patent which have been introduced in evidence in this case and state who prepared the specifications upon which those letters patent were granted.

A. I prepared the specification for the application, and also superintended the production of the drawings.

Q. 6. From what information were the drawings prepared?

A. As I recollect the matter, these drawings were prepared by our draftsman, the draftsman of Smith & Osborn, from drawings furnished us by Mr. William Pardy.

Q. 7. Do you know by whom those drawings were that furnished you were prepared? A. I do not.

Q. 8. Look at these specifications which are marked Complainants' Exhibit No. 4, and state whether or not they were the basis upon which you prepared the specifications of the letters patent in suit?

A. I have seen this manuscript that purports to be a specification of a riveting machine, and I have compared it with the printed specification of letters patent No. 434,677. The language in portions of the description of the construction of the machine was taken by me from a copy given to me at that time by Mr. William Pardy, at the time I wrote the specification, but whether this is the identical manuscript or not, I can't say.

(Deposition of Edward E. Osborn.)

Q. 9. From your examination of Exhibit No. 4, and of the letters patent sued on, what would you say as to the probabilities of this being the document that you had in use at the time you prepared those specifications for filing in the patent office?

A. I certainly prepared the specification from a description—either from that description or one like it. I can't say that that is the one that I used at that time.

Q. 10. What was Mr. George Pardy's business in the year 1886, or 1887?

A. Mr. George Pardy had an office on Montgomery street. He had a sign outside, "Solicitor of Patents and Expert in Patent Cases."

Mr. McKINLEY.—No questions.

EDWARD E. OSBORN.

Subscribed and sworn to before me this 13th day of February, 1905.

[Seal] FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California.

WILLIAM S. PARDY, a witness called on behalf of complainants, sworn, examined, testified as follows:

(By Mr. HARPHAM.)

Q. 1. State your name, age and residence?

A. William S. Pardy; 68; Fifth avenue; age, 36.

Q. 2. What relation do you sustain to Mr. William Pardy, one of the complainants in this action?

(Deposition of William S. Pardy.)

A.. I am a son of William Pardy.

Q. 3. You are a nephew of George Pardy, deceased?

A. I am a nephew of George Pardy, deceased.

Q. 4. Please look at this sketch, marked Complainants' Exhibit No. 5 and state whether or not you ever saw that before, and if so, when you saw it, and where?

A. Yes, I have seen this sketch before at the office of my uncle, George Pardy, which was at 402 Montgomery street, in the latter part of the year, 1887.

Q. 5. Please state the circumstances under which you saw that sketch?

A. Well, I called at his office and he introduced me to Mr. Hooker with whom he was conversing at the time, and they talked for quite a while, and after they got through their converstaion my uncle George sat down and made this sketch during the afternoon.

Q. 6. What Mr. Hooker was that?

A. Mr. J. D. Hooker of Los Angeles.

Q. 7. Do you remember what they were conversing about?

A. Mr. Hooker was telling my uncle that he would like to get a riveting machine that would rivet pipe, and that if he could get up such a machine he could make some money out of it.

Q. 6. Well, go on and state anything else that occurred at that conversation?

A. Well, my uncle at that time referred to a pipe-riveting machine that was at the Risdon Iron Works, and Mr. Hooker said it would not suit his purposes.

(Deposition of William S. Pardy.)

Q. 9. Did he state why it would not suit his purposes?

A. No, he did not.

Q. 10. Do you know whether Mr. Hooker had seen that machine at the Risdon Iron Works?

A. He said that he had seen it.

Q. 11. That he had seen it?

A. That he knew of that machine.

Q. 12. Were any suggestions made by Mr. Hooker to your uncle at that time in relation to the construction, the manner of construction of such patent riveting machine?

A. No, not in my presence. I saw my uncle George make that sketch after Mr. Hooker left the office, and I was told afterwards—

Q. 13. (Int.) Don't state anything that you were told. Just simply state only these things that you know of your own knowledge?

A. Well, afterwards I saw a piece of paper that was supposed to be of a riveting machine, that there was a good portion of it built from that sketch, the original sketch; that is, the idea of it.

Q. 14. Did you see that machine while it was being built? A. No, I did not.

Q. 15. Who built the machine?

A. Well, I don't know for a fact; only from hearsay.

Q. 16. Do you know whether your uncle George had been working upon a pipe riveting machine before he made that sketch, or not? A. I don't know.

(Deposition of William S. Pardy.)

Q. 17. Do you know whether he worked upon a pipe riveting machine at that time? Yes.

Q. 18. For how long?

A. Well, for a month after that he was working on it, and I left the city.

Q. 19. And you don't know how much longer than that he worked? A. No, I do not.

Cross-examination.

(By Mr. McKINLEY.)

XQ. 1. What did you say was the date of this conversations? A. It was 1887.

Q. How do you fix the time?

A. Because it was shortly after I left San Francisco for Reno, Nevada. I left in the beginning of the month of December.

Q. 3. Was this some time in the preceding month?

A. About a couple of months before that.

Q. 4. Probably in October?

A. Perhaps the beginning of October or the latter part of September.

Q. 5. What was your business at that time?

A. Well, I came to San Francisco during the month of May, and I was working in the printing business, on the "Alta California."

Q. 6. You had not been engaged in any mechanical business, that is, in the making of machinery or anything of that sort at that time?

A. No.

(Deposition of William S. Pardy.)

Q. 7. You were not familiar with those matters?

A. Only what I have been told; only what I had learned around my uncle's office.

Q. 8. You had been around his office considerably during that period, from May until that time?

A. Every day.

Q. 9. Now, when was this, morning or afternoon, that you were there on this occasion?

A. I generally went there in the morning and in the afternoon.

Q. 10. This occasion that you saw Mr. Hooker, was that morning or afternoon?

A. That was in the morning.

Q. 11. And was he there when you came in?

A. He was.

Q. 12. What was he doing then?

A. Talking with my uncle.

Q. 13. Discussing this matter? A. Yes, sir.

Q. 14. And how long did you remain?

A. I stayed there all the afternoon.

Q. 15. I thought this was morning?

A. I stayed there. You asked me how long I was there.

Q. 16. You were there right along? A. Yes, sir.

Q. 17. You stayed there through the whole forenoon?

A. Yes, sir.

Q. 18. You were there the rest of the forenoon?

A. Yes, sir.

Q. 19. Mr. Hooker arrived there before you did?

(Deposition of William S. Pardy.)

A. Yes, sir.

Q. 20. How long was he there before you came?

A. I suppose he was there an hour or so.

Q. 21. What were you doing during the time he was there?

A. Listening to them talk. My uncle introduced me to him and I sat there.

Q. 22. You sat and listened to the talk?

A. Yes, sir.

Q. 23. They were discussing the kind of machine that he wanted made?

A. He wanted a riveting machine made.

Q. 24. He described the character of the work he wanted done? A. Yes, sir.

Q. 25. And do you remember anything else in that conversation?

A. Well, he spoke about large quantities of pipe being used for irrigating purposes; that he wanted to get in and get some of the large contracts. I remember that well.

Redirect Examination.

(By Mr. HARPHAM.)

RQ. 1. During the time that you were visiting your uncle's office, what business was he engaged in?

A. Patent attorney.

RQ. 2. Do you know whether he had any experience in mechanical affairs of your own knowledge?

A. Yes, sir.

(Deposition of William S. Pardy.)

RQ. 3. What experience had your uncle in the mechanical line?

A. Well, he was a mechanical and civil engineer.

RQ. 4. Do you know whether he had ever been at work for any people in San Francisco before that time?

A. I believe he had worked at the Scotts' Iron Works.

RQ. 5. (By Mr McKINLEY.) This is of your own knowledge, is it?

A. This is what my uncle told me. I don't know of my own knowledge. I never saw him working there. I was only a boy when he worked there. Not of my knowledge I don't know as he worked anywhere. I do know he was considered a first-class mechanical and civil engineer.

RQ. 6. (By Mr. McKINLEY.) That is all you know about it?

A. Yes, sir.

Mr. McKINLEY.—The defendant moves to strike out that statement as a conclusion of the witness, hearsay and incompetent.

WILLIAM S. PARDY.

Subscribed and sworn to before me this 13th day of February, 1905.

[Seal] FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California.

WILLIAM PARDY, recalled by complainants for further examination.

RQ. 1. (By Mr. HARPHAM.) Mr. Pardy, this book, Complainants' Exhibit No. 1, shows a balance of $395.57?

A. A Wells-Fargo's balance?

RQ. 2. A Wells-Fargo's balance; yes, sir. State whether or not you ever collected that balance as executor of the estate.

A. As executor of the—I collected $395.57 from Wells-Fargo's bank.

RQ. 3. What other property did Mr. George Pardy leave?

A. He had $600 worth of United States bonds upon which I realized $759 for the estate.

RQ. 4. Do you know how long he had owned those bonds? Is there anything to indicate?

A. Oh, he had had them some time, I think.

RQ. 5. Have you any means of determining how much money Mr. George Pardy paid for the construction of that first pipe riveting machine?

A. I have the bills from the firm of Rix & Furth on the first machine built, and some bills pertaining to the second machine built.

RQ. 6. Where are the bills of that first machine built?

A. They are in that envelope. (Pointing.)

RQ. 7. Is that a correct statement? (Showing.)

A. This is a statement of checks drawn and delivered to the parties named here. There is a statement rendered

(Deposition of William Pardy.)

by Rix & Furth, under date November 4, 1889, and checks given by George Pardy to Rix & Furth.

Mr. HARPHAM.—I offer in evidence that statement and ask that it be marked as exhibit and attached to the deposition.

(Marked Exhibit No. 7.)

Mr. HARPHAM.—I offer in evidence the receipt and the three checks.

Mr. McKINLEY.—The defendant objects to the admission of the statement just offered in evidence, and also to the introduction of the receipt and the three checks, on the ground that they are incompetent and irrelevant, and no proper foundation laid.

Mr. HARPHAM.—You don't object to the statement because it is not established by Rix & Furth, do you?

Mr. McKINLEY.—No, no.

(The receipt and the three checks are pinned together and marked Exhibit No. 8.)

RQ. 8. What experience had your brother George in the mechanical line?

A. Well, he had enough to constitute himself as a mechanical engineer and draftsman and patent agent.

RQ. 9. What mechanical institutions did he work for in San Francisco?

A. He first got employment in the Vulcan Iron Works.

RQ. 10. How long did he work for the Vulcan Iron Works?

(Deposition of William Pardy.)

A. Many years, and under the Scotts'.

RQ. 11. At the Union Iron Works?

A. No. He got his training or knowledge of machinery and its manufacture mostly at the Vulcan Iron Works.

RQ. 12. Did he ever work for any rolling-mills?

A. I don't know whether the Vulcan Iron Works are rolling-mills or not.

Recross-examination.

(By Mr. McKINLEY.)

RXQ. 1. Have you detailed all the estate that your brother left, Mr. Pardy? You stated that he left these government bonds and $395 in bank?

A. That is all what I call cash.

RXQ. 2. Did he leave other estate than that?

A. He left some debts, uncollected, and office furniture.

RXQ. 3. By debts you mean accounts?

A. Accounts, yes, sir.

RXQ. 4. (By Mr. McKINLEY.) What did his estate net?

A. Sixteen hundred and eighty-seven dollars.

WM. PARDY.

Subscribed and sworn to before me this 13th day of February, 1905.

[Seal] FRANK L. OWEN,

Notary Public in and for the City and County of San Francisco, State of California.

Complainants' Exhibit No. 1.

WELLS, FARGO & CO.'S BANK

In Account with George Pardy.

Wells, Fargo & Co.'s Bank in account with Geo. Pardy.

Dr.					Cr.
1884					
Aug. 14.	Deposit	5000	1	ford	3900.00
			1		1
Oct. 29.		350	50		1
			50		50
Nov. 30.		500	50		50
			150		25
			5		75
			450		50
			50		25
			1		50
			1		25
			1		50
			50		25
			1		165
			250		165
			25		60
			1		135
			50		25
			25		50
			1		25
			1	v. R.	60
			1		

			50		
			150		
			1	Bal.	640
	5850	ford	3900		5850.00

Date		Amount		Amount
1886				
				1
Jany. 1.	Bal.	640		50
				25
				1
8.		150		25
				20
27.		500		2
				25
Apl. 14.		500		85
				60
Oct.		300		25
				25
				150
				1
				20
				50
				40
				20
				25
				1
				75
				25
			v. R.	50

				100
			Bale.	1595
		2090.00		2090.00
1886				
Nov. 1.	Balce.	595		60
12.		300		50
1887.				
June 18.		314.91		50
Oct. 18.		300		25
Nov. 28.		200		2
				95
				30
				1
				20
				20
				40
				50
				145
				25
				80
				2
				50
				2
				50
			v. R.	25
				50
			Bal.	174.61
		1709.91		170.91

1887				
Dec. 14.	Bal.	174.61		56.04
				100
30.		500		100
				50
1888.				50
Jany. 11.		250		313
				100
Mch. 24.		500		50
			v. R.	104
May 9.		500		25
				100
				50
				50
			Balance	776.57
		1924.61		1924.61

May 10.	Balance	776.57	100	100	50	83
			30	100	56	25
Sept. 11.		1000	50	100	75	250
			75	100	150	25
Nov. 3.		50	50	25	30	200
			25	20	100	30
Dec. 3.		500	70	75	25	25
						50
June 14.		193			Bal.	425.57
		2519.57				2519.57

June 17.	Bal.	425.57		100
28.		125	v. R.	25
July 18.		100		200
29.		100		30
			Bal.	395.57
		750.57		750.57
Sep. 2.	Balance	395.57		

[Endorsed]: Complainants' Ex. 1. F. L. O. N. P.

Complainants' Exhibit No. 2.

Stubs Attached to Check-book.

No. 1. Date Mch. 27, 1888. Amt. 100.
To Cash.

No. 2. Date Ap. 3, 1888. Amt. 50.
To Cash.

No. 3. Date Ap. 18, 1888. Amt. 50.
To Cash.

No. 4. Date May 1st, 1888. Amt. 100.
To Cash.

No. 5. Date May 7, 1888. Amt. 56.04.
To Calvin Nutting & Son. Bal. 776.57.

No. 6. Date May 11, 1888. Amt. 100.
To Jno. D. Hooker, 676.57.

No. 7. Date May 15, 1888. Amt. 50.
To Cash, 626.57.

No. 8. Date May 16th, 1888. Amt. 83.00.
To W. F. Buswell, 543.57.

No. 9. Date May 24, 1888. Amt. 30.

To Crocker & Co., 513.57.

No. 10. Date May 29, 1888. Amt. 56.00.

To W. K. Vanderslice & Co., 457.57.

No. 11. Date May 31, 1888. Amt. 100.

To Cash & Board, 357.57.

No. 12. Date June 16, 1888. Amt. 25.00.

To Cash, 332.57.

No. 13. Date July 7, 1888. Amt. ....

To cash, 50——182.57.

No. 14. Date ...., 188..... Amt. 100.

To W. Pardee, 182.57.

No. 15. Date ......, 188..... Amt. ....

To cash, $75. 107.51 Bal.

No. 16. Date Sep. 11, 1888. Amt. 250.00.

To Joel B. Low, 1107.51

250.00

———

857.51

No. 17. Date Sep. 13, 1888. Amt. 75.00.

To 782.51, cash for English Patent, etc.

No. 18. Date Sep. 21, 1888. Amt. 100.

To 682.51. Clothes, etc., 100$.

No. 19. Date 28 Sep. 1888. Amt. 150.00.

To 532.51, Jas. L. Drum.

No. 20. Date ......, 188..... Amt. ....

To Rent, 25.00. 507.51.

No. 21. Date Oct. 4, 1888. Amt. 50.

To Cash, 50$. 457.51.

No. 22. Date Nov. 2, 1888. Amt. 25.00.

To rent, A. H. 432.51.

No. 23. Date, Nov. 2, 1888. Amt. 30.

To Cash, 402.50.

Deposit, 50 / 452.51.

No. 24. Date Dec. 3, 1888. Amt. 200.

To Two hundred Board Drain, etc., 252.50.

500 / 752.51.

No. 25. Date Dec. 8, 1888. Amt. 25.

To twenty-five, 727.51.

No. 26. Date, ..., 188...., Amt. ....

To Jas. L. Drum, 20 707.51.

No. 27. Date Feb. 2, 1889. Amt. 100.

To Board & Rent, 100$. 607.51.

No. 28. Date, ..., 188..... Amt. ....

To Thirty 00/100, 577.51.

No. 29. Date Feb. 9, 1889. Amt. 70.

To Seventy 60/100, 507.51.

No. 30. Date Ap. 2, 1889. Amt. 25.

To Rent, 482.51.

No. 31. Date Ap. 2d, 1889. Amt. 75.

To Board, 407.51.

No. 32. Date May 3, 1889. Amt. 50.

To Board, 357.51.

No. 33. Date May 25, 1889. Amt. 25.00.

To Cash, 332.51.

No. 34. Date June 3, 1889. Amt. 100.00.

To Cash, 425.57, 232.51.

No. 35. Date July 3, 1889. Amt. 100.

To Board, 450.57, 325.51.

No. 36. Date July 18, 1889. Amt. 25.
To Cash, O. K. 425.57.
No. 37. Date 26 July, 1889. Amt. 200.
To Bearer (Drum), Bal. 225.
No. 38. Date 27 July, 1889. Amt. 30.
To L. M. Clement, Bal. 295.00.
No. 50. Date Oct. 1st, 1889. Amt. 6,20.
To C. A. Klinker & Co. Stamps.
No. 51. Date 10/26, 1889. Amt. ....
To Joe Poheim, Tailor, 25$.
No. 52. Date Oct. 2d, 1889. Amt. 25.
To wife.
No. 53. Date Oct. 2d, 1889. Amt. 87.00.
To Treasurer Ctfs. # 492. 566. 340. Canceled.
No. 53. Date Oct. 2d, 1889. Amt. 40.
To Safe Dept. Co.
No. 54. Date Oct. 2, 1889. Amt. 73.80.
To P. S. S. L. & B. Co. Dues #566.492.
No. 55. Date Oct. 4, 1889. Amt. 5.00.
To E. P. Unangst (A/c Mrs. Greene.)
No. 56. Date Oct. 4, 1889. Amt. 5.00.
To D. W. James. P. Robles (A/c Mrs. Greene.)
No. ......, Date ......, 188..... Amt. ....
To ....

WELLS FARGO & CO.'S BANK. (2)

San Francisco.

No. ...., 188.....

Pay to .... or order .... Dollars.

$......... ....

[Endorsed]: Complainants' Ex. "2." F. L. O. N. P.

Complainants' Exhibit No. 3.

WELLS, FARGO & CO.'S BANK (3)

San Francisco, May 11th, 1888.

No. 6.

Pay to Jno. D. Hooker, bearer, One Hundred 00/100 Dollars.

$100.00.

GEO. PARDY.

[Endorsed]: Jno. D. Hooker. Wells, Fargo & Co.'s Bank. Paid May 11, 1888.

(In lead pencil:) Borrowed money.

Complainants' Ex. "3." F. L. O. N. P.

Complainants' Exhibit No. 4.

GEORGE PARDY.

SPECIFICATION.

To All Whom It May Concern:

5 Be it known that I, George Pardy, a resident of the City and County of San Francisco, State of California, have invented a new and useful

RIVETING MACHINE

of which the following is a specification:

10

My invention relates to a machine for riveting the straight seams of sheet metal cylinders, such as

15 joints of piping, tanks, small boilers, etc., and it consists in a combination of parts hereinafter described and claimed.

In the accompanying two sheets of drawings forming part of this specification:

20 Figure 1 is a side elevation of the machine; Figure 2 is an end elevation of the same; Figure 3 is a plan
25 of the carriage hereinafter described: Figure 4 is a plan of the bar for the rivet sets.

Figure 5 is a plan of the driving shaft, pulleys
28 and belt shipping rig; Figure 6 is a transverse section of

(Endorsed.) Geo. Pardy. Notes. Riveting Machine.

1 the set bar, mandril and a joint of pipe.

5 In all the figures the same letters of reference are used to indicate the same parts:

10 The machine is intended to crush down and head cold rivets which have been inserted by hand into the holes to receive them before the pipe joint, as it may be, is introduced into the machine.

15 The general plan of the operation of the machine is as follows:

A sheet of metal having been punched with rivet
20 holes as required, then rolled in cylindrical form, then tacked together with a rivet at each end of the overlapping edges of the seam so as to keep the cylinder in shape, is struck with rivets all along
25 the seam until every hole but one at the end is filled; This cylinder is then hung upon the mandril of the machine, seam

(Endorsed.) Geo. Pardy's Draft of Spen Riveting Machine.

1 and rivet points uppermost; a bar called a set bar, having as many sets therein as there are rivets to be headed is then swung down upon its hinge over 5 the seam of the pipe joint with such proper guidance as that every set shall rest plumb upon a rivet and 10 every set project above the set bar as much as it is required that the rivet shall be crushed down to properly head it.

A carriage having a couple of small wheels front 15 and rear is then rolled over the set bar, with enough pressure to heavily press the overlapping edges of the seam together, a large wheel between the for- 20 ward and rear wheels at the same time crushing down the rivets by rolling over the heads of the sets with exactly as much pressure as the operation requires.

25 Half the work of heading the rivets is done as the 28 carriage moves forward, and the rest as it moves backward.

1 The machine may be thus described in detail: A is a bed plate or foundation frame; B, B B, B are 5 vertical posts bolted at the bottom of the bed plate; Joining the tops of each opposite post are cross-beams C, C, C, C, fastened in place by stirrup bolts c, c, c, c, and strap washers c′, c′, c′, c′, each bolt 10 passing around a lug c^2, cast solid on the post and their ends passing through the strap washers and having screw nuts c^3, on top, the strap washers 15 straddling the cross-beams:

To underneath the four cross-beams is single longitudinal beam D is bolted by bolts d; Two other
20 cross-beams E, E′, rest between the two rear pair of posts upon lugs e, e′, case thereon; these beams being held immovable by tapering keys e^2, driven be-
25 tween the top face of the beams, and lugs e^3 cast on the posts.

All the beams are what are called deck beams of
28 I shaped Cross-section: The bears E and E′, sup-
1 port the inner end of the mandril F which is secured to them by the stirrup bolts f f; these bolts
5 straddling the mandril whilst their ends pass down through the flanges of the beams to terminate with screw nuts f′ underneath:

The forward end of the mandril has a swinging
10 pivotal prop G, to support it, which rests its journals g, in bearings g′ cast on the lower ends of the contiguous posts; This prop is swung down out of
15 the way when a pipe joint is being put on or taken off the mandril, and it should have a counterbalance weight g^2 proportioned so that the tendency of the
20 prop will be to swing upwards when not actually held down. Where the prop bears against it, the mandril is cut away upon a curved line correspond-
25 ing to the curve described by the point of the prop as it swings in and out;

28 H, is the set bar, hinged upon a point at h, about
1 middle of third pair of posts.

This bar has as many holes bored through it as
5 there are rivets to be headed down, each hole being accurately placed and fitted with a rivet set I, made of hardened steel, a slightly increased diameter at the top of the sets preventing them falling through the holes when the bar is raised; Each
10 set will have a concave point corresponding to the shape of the rivet head it is intended to form, but they should be flat on top.

15 The bar should have a transverse section perfectly flat on top but concave on the bottom to suit the average curve of the cylinders to be riveted, thus if the machine is intended to rivet pipes from
20 six to twenty-four inches in diameter the curvature suitable for a fifteen-inch pipe might be adopted.
25 Still however should the bottom be made flat it would simply cause the seam to be flattened out too, which would be observable in the smaller pipes
28 but scarcely so in the larger ones.

1 This set bar will require to have steel sides hardened, the center however in which the sets are held
5 may be either iron or steel, it being the intention not to submit the center of the bar to any pressure whatever.

In making this bar the steel strips on the sides may
10 be either welded or bolted on; The front end of the bar is suspended by the link J, from the lever J′, which has its fulcrum a jaw bolt J^2, secured on the front cross-beam K, which supports the forward ends
15 of the screw shafts L, L; There is a counter-weight

J^3 on the overhanging end of the lever J′ adjustable
20 as to the distance from the fulcrum so as to slightly
overbalance the weight of the suspended end of the
set bar, and tend to raise it when not held down by
the latch M;

This latch M, is a simple hook pivoted at about its
25 center to the side of the set bar, projecting above it
28 about an inch or so; It also projects below the set
1 bar terminating in a hook shaped end which engages
with the pin m driven into the side of the mandril,
being held in position disengaged from said pin, as
5 shown in dotted lines, by a spring pad m′ of rubber
or steel countersunk into the mandril placed behind
10 it so as to press against the latch with a binding
pressure sufficient to hold it from dropping back under the pin; where this latch is placed the mandril is
flattened off to accommodate it. The function of the
15 latch is to prevent the bar from tipping up at the
outer end when the pressure is downward at the ex-
20 treme inner end beyond where the bar rests on the
pipe, the edge of the metal of the pipe forming a fulcrum upon which the bar swings in a vertical plane
unless the bar is held down until the pressure rollers
25 pass fairly over the seam of the pipe, after which
28 there will no longer be any tendency to tip up the bar
1 in front. The bar is guided to drop exactly in the
center by the tapering pin h′ entering the hole in the
mandril. The pipe joint in the act of being riveted is
5 held in place so that every rivet will be exactly under a set, by a tapering pin h^2 projecting downward

10 from the lower face of the set bar into the last rivet hole of the pipe which is left without a rivet until the adjoining joint is attached, and the round seam is riveted up; The front end of the joint is held in
15 place by slipping a sleeve or ferrule h^3, over the shank of the last rivet in front which sleeve enters the hole for the set in the set bar and pushing the set out draws the pipe joint into proper alignment
20 if it should be a trifle out. Afterwards this sleeve h^3 is picked one of the hole in the bar from above and the displaced set returned to its place. The upper
25 end of the sleeve or ferrule should be slightly taper-
28 ing so as to enter the hole in the bar easily.

1 N is a carriage within which is mounted the pressure wheels O, O, O′, O′, and P. The two top wheels
5 O, O, bear against the underside of the bean D, with a force equal to the sum of the pressures used to press the overlapping edges of the pipe together and the pressure required to head down the rivets minus the
10 weight of the carriage and pressure wheels.

The two lower pressure wheels O′, O′, are grooved
15 on the face so as to pass over the rivet sets without touching them, their edges bearing directly on the sides of the set bar with a downward force equal to what is proper to apply to close the seam; The
20 wheel P, is independent of the wheels O′, O′, and is given a pressure just equal to the needs of the rivet-
25 ing operation, and no more; All the wheels have journals on each side of the carriage, carried in brass

boxes o, o, o′, o′, p suitably fitted in recesses pro-
28 vided for them.

1 The carriage is formed of two heavy slabs of cast
iron held a distance apart, to give room for the wheels
5 between, by connecting bars of metal n, front and rear
placed between the upper and lower wheels.

The carriage may be cast in one solid piece or each
10 side may be a separate piece the two sides being after-
wards bolted together, as may be found most con-
venient in fitting the parts together. As the center
of the carriage will be weakened by having the large
15 open space to accommodate the boxes for the journals
of the center wheel a couple of wrought iron bars n′
having holes bored through them at each end are
20 fitted over the projecting journals of the lower small
wheels on either side thereof, thus bracing the sides
25 of the carriage across the openings n^2 n^2 are bosses
cast on the sides of the carriage and Q, Q, are brass
28 screw nuts fitted, upon the screw shafts, between them;
1 The screw shafts L, L, in revolving carry the nuts
Q, back and forth and with them the carriage against
5 which they bear; They are supported in journal
boxes cast on the cross bars K, K′, at each end of the
machine; On the back end of each screw a toothed
gear wheel R, is fitted which wheels engage with a
10 toothed gear wheel R′ interposed between them, this
latter wheel being fitted on the countershaft S, which
15 is driven alternately to the right and left, by straight
and crossed belts S′, S^2 transmitting motion from a
main line shaft or other source of power near by;
The outside pulleys on the countershaft are loose on
20 the shaft whilst the middle one is fastened thereon
by key or set screws.

The end thrust of the screw shafts will be taken up by the collars l, l, secured upon the shafts outside their journal boxes;

The means for imparting a pressure through the small wheels and set bar to the overlapping edges of the seam of the pipe placed between the set bar and the mandril, consists in putting shims under the journal boxes of the upper wheels until the upper and lower wheels are spread apart a distance sufficient to produce the desired pressure on the bar when the carriage is forced along by the revolving screws. The nicest possible adjustment may be made by using very thin shims care being taken to put the same thickness of shims under each of the four boxes;

The pressure on the large wheel in the middle is produced by shims placed over the journal boxes; The riveting should not be done completely as the carriage is moved forward but one-half the work should be left for the backward stroke, hence the journal boxes of the middle wheel may rise to the top of their recesses, when the carriage advances, leaving the lowest point of the wheel about one-eighth of an inch below the tops of the sets which of course must be crushed down that distance before the wheel can pass over them. When the carriage returns on the back stroke the swinging shims T, are automatically pushed in between the top of the journal boxes and the roof of their recesses, thus preventing the wheel from rising as high as before and the rivets will be further crushed down according to the thickness of the shims; These swinging shims are fastened to horizontal bell cranks t, each having a fulcrum pin t', passing through a jaw bolt t^2 and, being guided in a slotted guide bar t^3, which is secured to the side of

20 the carriage in such a position as to ensure the shims being accurately guided into their recesses:

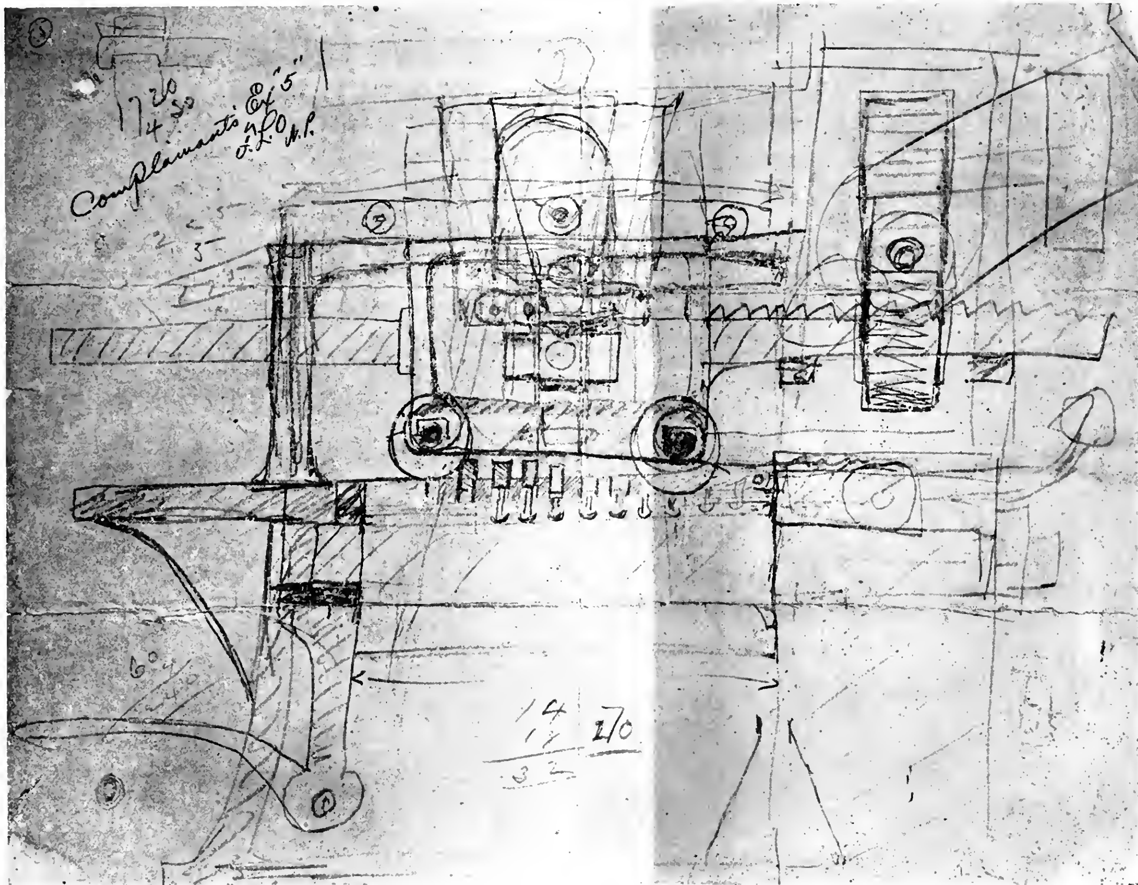
The swinging in of the shims is accomplished by
25 the short arm of the bell cranks coming in contact
28 with the suspended bars t^4, hung on the ends of rods
1 t^5 projected from the beam D, just as the carriage
1 reaches the end of the stroke in traveling forward, the swinging out being effected by the arm of the bell
5 crank striking similar swinging bars t^4 suspended behind the second pair of posts. (Shown in dotted lines.)

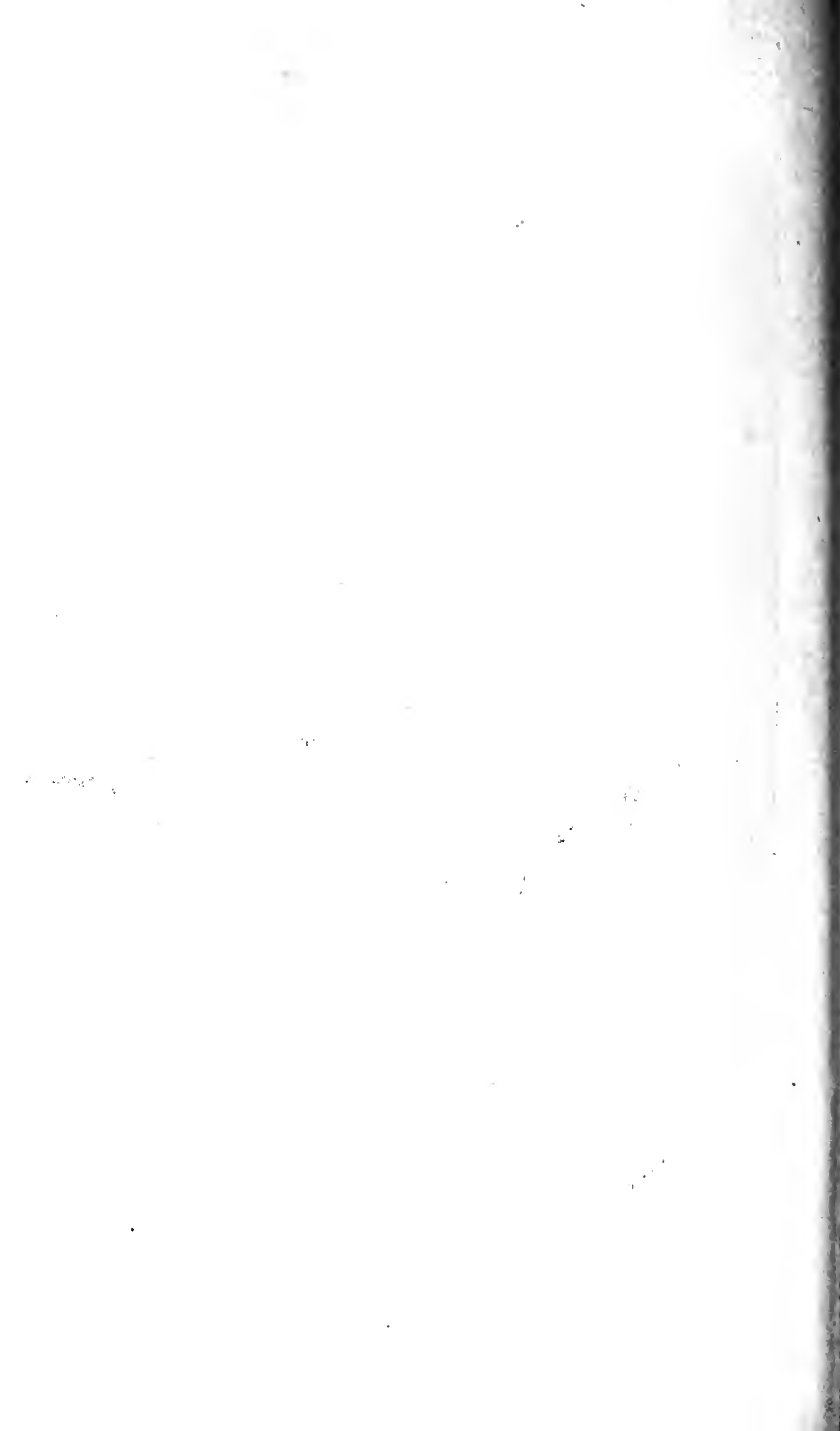
The suspended bars t^4 should be fixed to move
10 rather stiffly but still yield when pushed against hard, as it is desirable that the shims should be sent well home but without danger of anything being broken
15 should the carriage move a trifle too far.

The shims are thrown in when the center wheel rolls down after passing over the last of the sets in
20 front, and they are thrown out immediately after returning over the first set in the rear.

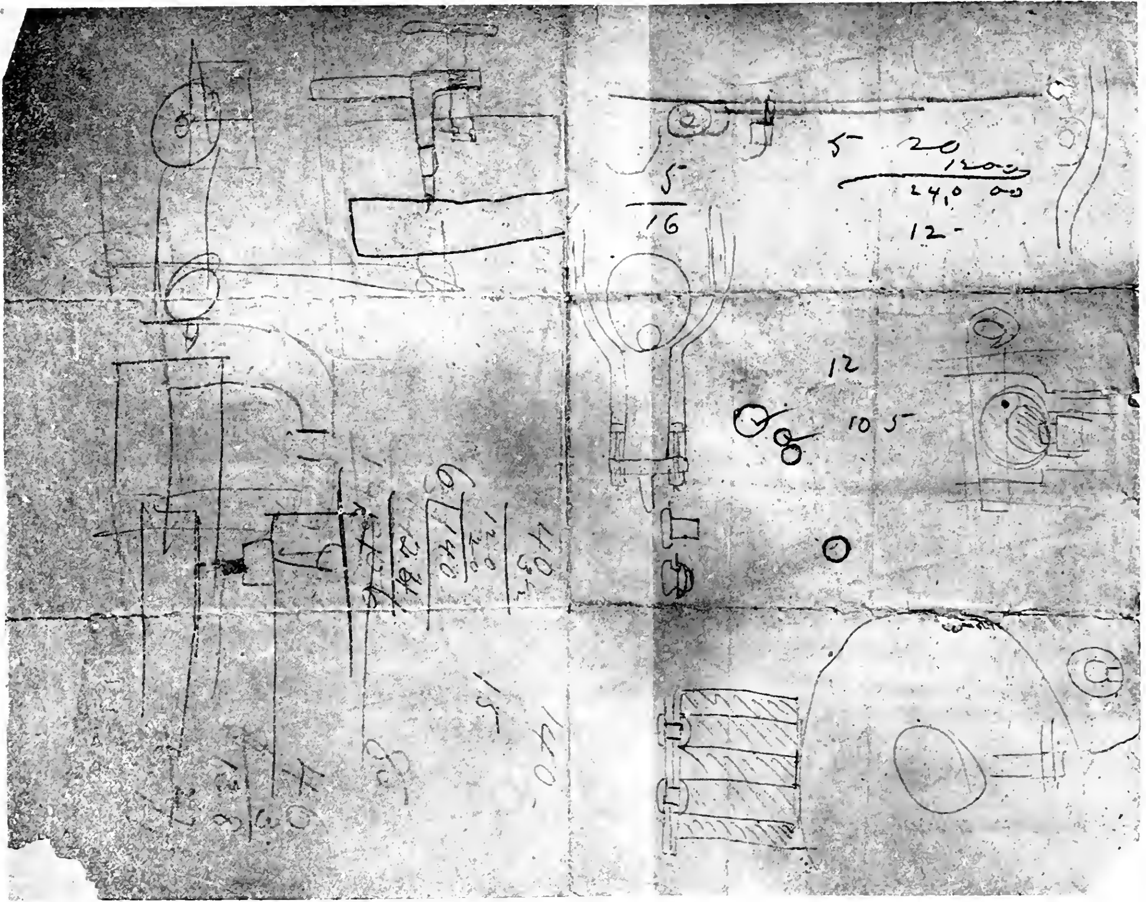
There is a bar t^6 fitted on top of the mandril in the
25 rear of the set bar having about the same height and width it forms a track for the carriage to roll on after it leaves the set bar;
28 here is a lever V.

[Endorsed]: Specification of Riveting Machine. Invented by George Pardy Riveting Machine. Complainants Ex. "4," pages 1 to 16, inclusive, F. L. O. N. P.


Complainants Ex "5"
J. L. O. N.P.



[Back of Complainants' Exhibit 5.]



Complaintants' Exhibit No. 6.

20

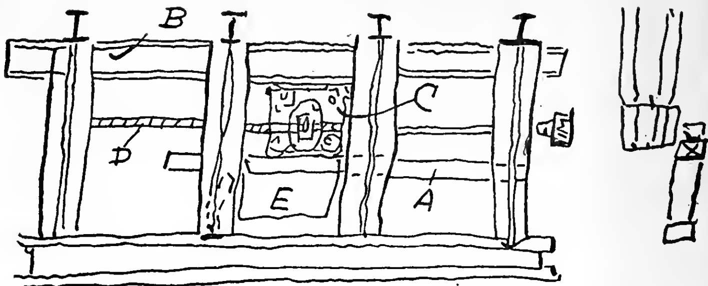
402 Montgomery St., Octr. 22d, 1887.

Norman Selfe, Esq.,

My dear Sir: I have just time to ask of you to drop me a line and inform me if there is any riveted pipe for irrigation purposes made in N. S. W. & the other Colonies and would a patent for a riveting machine be of any value there. I am making one at a cost of 900$ which will rivet the straight seams two rows of rivets in about 2 minutes, by hand it takes 15 minutes, I have an order for 4 machines, and can get an order for about 25 in California at $2500 each.

The machines wont cost $600 when made by the lot. Now you surely have pipes for irrigating, say from 4″ to 24″. #20 to 12 iron 5 to 10 lbs rivets. $\frac{1}{8}$ to $\frac{1}{4}$ diameter cold riveting; Machine is a very simple affair, simply a heavy roller adjustable to press from 3 to 10 tons on top of a series of steel sets held in a bar and set on top of rivets, the roller is propelled by two screws one on each side.

Every one thinks it will be a grand success. Two small rollers run in front of big roller and two behind to press the iron together. here is a sketch.



A—steel mandril.

B—heavy beam.

C—carriage to give pressure.

D—screws.

E—section of pipe.

Give your idea.

Truly yours,

GEO. PARDY.

[Endorsed]: Complainants' Ex. 6. F. L. O. N. P.

Complainants' Exhibit No. 7.

EDWARD A. RIX. J. E. de RUYTER. J. K. FIRTH.

Manufacturers of all Kinds Mining Machinery, Pneumatic Locomotives, Steam Locomotives, Water Wheels Ice Machines, Quartz Mills.

Air Compressors, Miners' Horse-whims, Electric Motors, Corless Engines, Hoisting Engines, Rock Drills, Boilers.

PHOENIX IRON WORKS.

Established 1849, Telephone 965.

Location of Works, 225-227-229 First St.

Cable Address:

Phoenix San Francisco.

RIX & FIRTH.

San Francisco, Nov. 4th, 1889.

Wm. Pardy, Esq., Safe Deposit Building, City.

Dear Sir: Yours of the 2nd at hand and in reply would state that Mr. George Pardy paid to us on the following dates, the amounts set opposite.

Oct. 18th, 1887	$200.00
Nov. 25th, 1887	$140.00
Dec. 28th, 1887	$100.00
Dec. 30th, 1888	$396.55
Jan. 17th, 1888	$124.80
	$961.35

This is the whole amount paid to us by Mr. Pardy for the riveting machine.

Yours Resp'y,

RIX & FIRTH,

PILSBURY,

Dic. F. W. P.

[Endorsed]: Complainants' Ex. "7." F. L. O. N. P. Rix & Firth Acct. of 1st machine. Rix & Furth payments on 1st machine Nov. 4, 1889.

Complainants' Exhibit No. 8.

(8) WELLS, FARGO & CO.'S BANK.

No. 35. San Francisco, Oct. 18, 1887.

Pay to Rix & Firth or order, Two Hundred 00/Dollars.

$200.00. GEO. PARDY.

[Endorsed]: For Deposit, Rix & Firth. Rogers. Pay through Clearing-house, 1, Oct. 21, 1887. The Bank of California. Wells, Fargo & Co.'s Bank. Paid Oct. 21, 1887. Complainants' Ex. 8. F. L. O. N. P.

WELLS, FARGO & CO.'S BANK.

No. 42 San Francisco, Dec. 30th, 1887.

Pay to Rix & Firth or order, Three Hundred & thirteen Dollars. $313.

GEO. PARDY.

[Endorsed]: Rix & Firth for deposit. Pay through Clearing-house, 1, Dec. 31, 1887. The Bank of California. Wells, Fargo & Co.'s Bank. Paid Dec. 31, 1887. Complainants' Ex. 8. F. L. O. N. P.

WELLS, FARGO & CO.'S BANK.

No. 45. San Francisco, Jan. 17th, 1888.

Pay to Rix & Firth or order, One Hundred & four Dollars. $104 00/000.

GEO. PARDY.

[Endorsed]: For deposit. Rix & Firth. Rogers. Pay through Clearing-house, 1, Jan. 20, 1888. The Bank of California. Wells, Fargo & Co.'s Bank. Paid Jan. 20, 1888. Complainants' Ex. 8. F. L. O. N. P.

San Francisco, Nov. 25, 1887.

Received of George Pardy Three hundred & forty Dollars, in part payment for Riveting Machine.

$340/00.

RIX & FIRTH.

(On left-hand margin): Phoenix Iron Works, Edward A. Rix & Co., Proprietors, 18 and 20 Fremont street.

[Endorsed]: Complainants' Ex. 8. F. L. O. N. P.

[Endorsed]: No. 1125. U. S. Circuit Court, Southern District of California, Southern Division. William Pardy et al. vs. J. D. Hooker Company. Depositions of William Pardy, et al., taken before Frank L. Owen, N. P. Filed Apr. 7, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

In the Circuit Court of the United States, Southern District of California, Southern Division.

IN EQUITY.

WILLIAM PARDY and ALBERTINE HASLER,
Complainants,
vs.
J. D. HOOKER COMPANY (a Corporation),
Defendant.

No. 1125.

Testimony.

Testimony taken on behalf of complainants, by agreement and consent of counsel for the respective parties, before Leo Longley, Esq., Special Examiner in Chancery, at the office of Hazard & Harpham, 16 Downey Building, in the city of Los Angeles California, on September 30th, 1904, at 2 o'clock P. M.

Appearances:

GEORGE E. HARPHAM, Esq., Appearing on Behalf of Complainants;

J. W. McKINLEY, Esq., and A. H. VAN COTT, Esq., Appearing on Behalf of the Defendant.

Mr. HARPHAM.—We will offer in evidence the letters patent numbered 434,677, issued to William Pardy, as executor, for riveting machine, bearing date August 19, 1890; and ask leave to substitute for the original letters patent, a patent office copy.

(The copy of the document last referred to is marked Complainants' Exhibit No. 1—L. L.)

Mr. HARPHAM.—Now, I offer in evidence a certified copy of the decree of settlement of accounts and final distribution in the estate of George Pardy.

(The document last referred to is marked Complainants' Exhibit No. 2—L. L.)

Mr. HARPHAM.—I now offer in evidence certified copy of the will and the order admitting the same to probate, and the issuance of letters testamentary, of Mr. George Pardy.

(The document last offered is marked Complainants' Exhibit No. 3—L. L.)

Mr. HARPHAM.—I now offer in evidence the assignment of George Pardy, of date May 2d, 1903, assigning all of his right, title and interest in and to letters patent numbered 434,677, and his rights of action.

(The document last offered is marked Complainants' Exhibit No. 4—L. L.)

Whereupon the further taking of testimony herein was adjourned to Thursday, October 6th, 1904, at 2 o'clock P. M., at the same place.

Thursday, October 6th, 1904, 2 o'clock, P. M.

Present: George E. Harpham, Esq., appearing on behalf of the complainants; J. W. McKinley and A. H. Van Cott, Esquires, appearing on behalf of the defendant.

Whereupon the further taking of testimony herein was resumed, pursuant to the adjournment, as follows:

F. K. SIMONDS, a witness produced on behalf of the complainants, being first duly cautioned and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, deposes as follows:

Direct Examination.

(By Mr. HARPHAM.)

Q. 1. Mr. Simonds, what is your age, residence and occupation?

A. Forty-six; manufacturer; residence, 2801 South Flower.

Q. 2. What line of manufacture are you engaged in?

A. Manufacturer of riveted steel well and water pipes, tanks, and everything in regard to irrigation and domestic supplies.

Q. 3. How long have you been engaged in the business of manufacturing riveted steel pipe?

A. Oh, I should say eighteen or nineteen years.

Q. 4. Are you acquainted with J. D. Hooker?

A. Yes, sir.

Q. 5. The president of the defendant corporation, the J. D. Hooker Company? A. I am.

Q. 6. How long have you known him?

A. I guess about the same length of time; eighteen or nineteen years.

Q. 7. Were you ever connected with him in business?

A. Yes, sir.

Q. 8. And, if so, when and where, and for how long?

A. Los Angeles, for about seventeen years.

(Testimony of F. K. Simonds.)

Q. 9. What line of business was he engaged in at the time you were connected with him?

A. Manufacture of riveted well and water pipe.

Q. 10. Were you ever connected with the defendant corporation, the J. D. Hooker Company, and if so, when and where and for how long?

A. Yes, I was connected with them, but I cannot tell you right now when I think they were incorporated. I think it was in 1895. Or—yes, it was in 1895; up to within two years ago, rough figures.

Q. 11. And what line of business was said corporation engaged in during the time you were with them?

A. The corporation was manufacturing riveted steel pipe, plumbing goods. Had a store on Los Angeles street carrying general supplies.

Q. 12. The corporation, as I understand it, succeeded to the business of J. D. Hooker as an individual?

A. Yes, sir.

Q. 13. During the time that you were with the defendant corporation, did it have any machinery for manufacturing riveted steel pipe?

A. Yes, sir; that is, to manufacture a portion of it.

Q. 14. Did said corporation have any pipe-riveting machines in its factory? A. Yes, it did.

Q. 15. I now show you United States Letters Patent numbered 434,677, issued to William Pardy, as executor of George Pardy, deceased, for a riveting machine, and ask you to look at said patent and state whether or not the defendant corporation had in its pipe factory at Los

(Testimony of F. K. Simonds.)

Angeles during the time that you were with said corporation, any pipe machines constructed as described and shown in those letters patent?

A. Well, I have read through the letters patent. I should say we have got three like that.

Q. 16. (By Mr. VAN COTT.) Well, "I should say"—

A. I have not seen them before, but I suppose these are the duplicate of what I have got in my office.

Q. 17. Have you read those?

A. Yes, sir; got a machine made by them. The general description of this drawing is just the same as we have—that is, the main points. We have made some improvements on ours.

Q. 18. (By Mr. HARPHAM.) How many of those machines did the defendant corporation have in its factory during the time you were in its employ?

A. Three.

Q. 19. Were those machines used in their business?

A. Yes, sir.

Q. 20. Did those machines have the combination of a stationary mandrel or work-support, a gang of rivet-sets mounted in a holding-bar, which is laid over the line of rivets with a rivet-set directly upon each rivet, and a traveling pressure wheel or roller having movement along the rivet-set bar and adapted to act upon the heads of the rivet-sets with suitable pressure?

A. Yes, sir, they had.

Q. 21. Did those machines have a stationary mandrel

(Testimony of F. K. Simonds.)

or work-support, a rivet-set bar having a gang of rivet-sets loosely mounted therein and adapted to be raised from the mandrel for inserting a piece of work and to be brought down and secured in place over the seam or joint to hold a rivet-set directly upon each rivet of the work, a traveling-pressure roller mounted in a carriage to travel along the set-bar over the heads of the rivet-sets, an overhead rail arranged above said set-bar and adapted to hold the carriage down to its work with suitable pressure, and mechanism for moving said carriage over the work between the set-bar and the overhead rail? A. Yes, sir.

Q. 22. Did those machines have the combination, with a stationary mandrel of the gang of rivet-sets, the traveling carriage, pressure wheel or roller, overhead rail, screw-shafts, driving-gear, reversely-driven pulleys, driving-pulley, and belt-shifting mechanism adapted to be operated on by the carriage to control and reverse the movements thereof? A. Yes, sir.

Q. 23. Did those riveting machines have a stationary mandrel supported permanently at one end and at the opposite end by a swinging support arranged to be thrown clear of the mandrel to insert and remove tubular work, in combination with the removable rivet-sets mounted therein and the centering-pins in the set-bar adapted to take through the work and into the mandrel beneath? A. Yes, sir.

Q. 23⅓. Did those machines comprise the combination of the stationary mandrel or work-support, rivet-set

(Testimony of F. K. Simonds.)

bar, loosely-mounted river-sets, traveling carriage, one headrail, pressure wheel or roller having axle-boxes moveable in recesses in said carriage, and the shims or plates adapted to take in said recesses over the axle boxes? A. They did.

Q. 24. Did those riveting-machines comprise a traveling carriage having a pressure wheel or roller mounted therein, a gang of rivet-sets mounted in a holding-bar, a stationary mandrel adapted to support the work under the rivet-sets, mechanism for moving said pressure-roller carriage back and forth along over the rivet-set bar, and means for setting down the pressure-roller against the heads of the rivet-sets in the return or backward movement of the carriage? A. Yes, sir.

Q. 25. Did those machines have in combination with the stationary mandrel or work-support, the rivet-set bar hinged at one end, the supporting-lever to which the opposite end is attached, and the latch arranged to hold down that end? A. Yes, sir.

Q. 26. Did those riveting-machines comprise a gang of rivet-sets mounted in a holding-bar by which they are placed and held in position on a line or lines of rivets to be crushed down and headed in combination with a stationary work-support and a traveling riveting-tool adapted to move over said holding-bar with suitable pressure against the heads of the rivet-sets?

A. Yes, sir.

Mr. HARPHAM.—Take the witness.

(Testimony of F. K. Simonds.)

Cross-examination.

(By Mr. VAN COTT.)

Q. 27. Were the three machines that you say were there alike?

A. Well, there was one small one, one medium, and one large one, the way we termed them down there.

Q. 28. Are they the same in detail?

A. Yes, sir; same principle.

Q. 29. I didn't ask you that. Were they the same in detail?

A. No; when you get down detail, one was single roll and the other two were alike.

Q. 30. Were those the only differences in detail?

A. What?

Q. 31. Were those the only differences in detail?

A. Well, the medium would not take as large a pipe as the large one.

Q. 32. You understand what I mean by "in detail," don't you?

A. In detail they were the same, yes, sir.

Mr. VAN COTT.—That is all I want to ask.

Mr. McKINLEY.—That is all.

WILLIAM L. BELL, a witness produced on behalf of the complainants, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, deposed as follows:

(Testimony of William L. Bell.)

Direct Examination.

(By Mr. HARPHAM.)

Q. 1. Please state your name, age and place of residence, and occupation?

A. Age, 44; residence, Los Angeles; occupation, mechanical engineer.

Q. 2. Are you connected with any manufacturing establishment? If so, state the name of it.

A. Manager of the Fulton Engine Works.

Q. 3. How long have you been connected with the Fulton Engine Works, Mr. Bell?

A. Oh, fourteen years next March.

Q. 4. Are you acquainted with J. D. Hooker of this city? A. Yes, sir.

Q. 5. How long have you known him?

A. About the same length of time.

Q. 6. Has he been engaged in business in this city? If so, state what it was.

A. Manufacturing sheet iron pipe.

Q. 7. Did the corporation of which you are manager ever make any pipe-riveting machines for him?

A. Yes, sir.

Mr. VAN COTT.—That is objected to in that form as leading. "For him." I can explain my point. If it was done on written order, of course the written order would be the best evidence. That is getting right down to the nub of the case. I object to that as a leading question.

(Testimony of William L. Bell.)

Mr. HARPHAM.—'M-h-m.

Q. 8. State about what time such machines were made.

A. I have not looked at the date when it was made. I think it was about two or three years after I came here. It might be a year away from that.

Q. 9. That would be, then, in the neighborhood of 1893? A. Yes, I should think so.

Q. 10. In your business, Mr. Bell, you are accustomed to examining patent drawings, are you?

A. I see some occasionally.

Q. 11. Yes. And you do a good deal of drawing, don't you, for your work? A. Yes, sir.

Q. 12. And accustomed to constructing machinery from drawings? A. Yes, sir.

Q. 13. Well, now, will you please look at patent numbered 434,677, issued to William Pardy, as executor of George Pardy, for a pipe riveting-machine, bearing date August 19th, 1890, and state whether or not any of the riveting-machines that you made for Mr. Hooker were constructed like the machine shown in that patent.

Mr. VAN COTT.—I object to that, on the ground that involves a conclusion, that it was made for Mr. Hooker, and there is no competent evidence yet that it was made for Mr. Hooker. Also, incompetent, irrelevant and immaterial.

Mr. HARPHAM.—I will change the form of the question, then.

(Testimony of William L. Bell.)

Q. 14. Did Mr. Hooker ever order from the Fulton Engine Works a pipe riveting-machine like that shown in the letters patent shown you?

Mr. VAN COTT.—I object to that, on the ground that it calls for the conclusion of the witness; that if there was an order in writing, the writing is the best evidence. If it was an oral order, it has not been shown that the order was given to this witness. Therefore, it is incompetent, irrelevant and immaterial.

A. The question is, Did Mr. Hooker ever order a machine like this?

Q. 15. (By Mr. HARPHAM.) Yes.

A. Yes.

Q. 16. Did the Fulton Engine Works ever build a machine for Mr. Hooker like that shown in that patent?

Mr. VAN COTT.—That is objected to, on the ground that it calls for the conclusion of the witness on the point that it was for Mr. Hooker, no foundation being laid for such testimony; incompetent, irrelevant and immaterial.

A. Yes.

Q. 17. (By Mr. HARPHAM.) Did you ever have any conversation with Mr. Hooker in relation to the building of such machine with reference to the Pardy patent? A. Yes, sir.

Q. 18. State, as nearly as you can recollect what that conversation was.

(Testimony of William L. Bell.)

A. Mr. Hooker sent for me to come over to his works, and explained that he wanted to build a machine of a larger size than two machines that he already had in use; and he said that the two machines that he had in use that he had developed—developed those machines with the assistance of Mr. Pardy, George Pardy, who had come from San Francisco, as I recollect, and had made the drawings and plans to suit the conditions of his—the requirements of his work, and that some time after these machines were built that Mr. Pardy had applied for a patent on this machine, and that Mr. Hooker considered that he was the one who had the ownership of the machine, and that he wished to have a figure from me to build this larger machine, and that if there was any claims made against us for any royalty on the machine that he would pay all such claims. Then, afterwards, after we had submitted prices and we finally made a contract—we finally received his order. I don't know whether it was a verbal order or whether it was a written order; but we built the machine and built it to handle, I think, 30 inch diameter pipe three feet long; and some few months afterwards he had us change the same machine again to make it suitable to take pipe five feet long.

Q. 19. In that machine was there the combination of a stationary mandrel or work-support, a gang of rivet sets mounted in a holding-bar, which is laid over the line of rivets with a rivet-set directly on each rivet,

(Testimony of William L. Bell.)

and a traveling pressure wheel or roller having movement along the rivet-set bar and adapted to act upon the heads of the rivet-sets with suitable pressure?

A. Yes, sir.

Q. 20. Was there, in that riveting-machine a stationary mandrel or work-support, a rivet-set bar having a gang of rivet-sets loosely mounted therein and adapted to be raised from the mandrel for inserting the piece of work to be brought down and secured in place over the seam or joint to hold a rivet-set directly upon each rivet of the work, a traveling pressure roller mounted in a carriage to travel along the set-bar over the heads of the rivet-sets, an overhead rail arranged above said set-bar and adapted to hold the carriage down to its works with suitable pressure, and mechanism for moving said carriage over the work between the set-bar and the overhead rail? A. Yes, sir.

Q. 21. Was there in that machine the combination, with the stationary mandrel, of the gang of rivet-sets, the traveling carriage, pressure wheel or roller, overhead rail, screw-shafts, driving-gear, reversely-driven pulleys, driving pulley, and belt-shifting mechanism adapted to be operated on by the carriage to control and reverse the movements thereof? A. Yes, sir.

Q. 22. Was there in that riveting machine the stationary mandrel supported permanently at one end and at the opposite end by a swinging support arranged to be thrown clear of the mandrel to insert and remove tubular work, in combination with the removable rivet-

(Testimony of William L. Bell.)

sets mounted therein and the certering-pins in the set-bar adapted to take through the work and into the mandrel beneath? A. Yes, sir.

Q. 23. Was there in that riveting machine the combination of the stationary mandrel or work-support, rivet-set bar, loosely-mounted rivet-sets, traveling carriage, one head rail, pressure wheel or roller having axle-boxes movable in recesses in said carriage, and the shims or plates adapted to take in said recesses over the axle boxes? A. Yes, sir.

Q. 24. Was there in that riveting-machine a traveling carriage having a pressure wheel or roller-mounted therein, a gang of rivet-sets mounted in a holding-bar, a stationary mandrel adapted to support the work under the rivet-sets, mechanism for moving said pressure-roller carriage back and forth along over the rivet-set bar, and means for setting down the pressure-roller against the heads of the rivet-sets in the return or backward movement of the carriage? A. Yes, sir.

Q. 25. Was there in that riveting-machine the combination with the stationary mandrel or work-support, the rivet-set bar hinged at one end, the supporting-lever to which the opposite end is attached, and the latch arranged to hold down that end? A. Yes.

Q. 26. Was there in that riveting-machine a gang of rivet-sets mounted in a holding-bar by which they are placed and held in position on a line or lines of rivets to be crushed down and headed, in combination with a stationary work-support and a traveling riveting-tool

(Testimony of William L. Bell.)

adapted to move over said holding-bar with suitable pressure against the head of the rivet-sets?

A. Yes, sir.

Mr. HARPHAM.—Take the witness.

Cross-examination.

(By Mr. VAN COTT.)

Q. 27. What was your position with the manufacturing company? A. Manager.

Q. 28. And as such you had the superintendence of the manufacture of whatever was sent out from the factory, eh? A. Yes, sir.

Q. 29. Did you see the machines in Mr. Hooker's factory?

A. Which? The original machines?

Q. 30. The two first machines. A. Yes, sir.

Q. 31. What is the advantage of making—you spoke of a change being made in the machine, which your people made. What was that change?

A. Well, the lengthening. We afterwards lengthened the machine so as to take five feet pipe, is my recollection. This other was three feet.

Q. 32. You say you don't know whether there was a written or oral order for the machine?

A. I can't remember; no, sir.

Q. 33. It was not part of your businesss to receive orders for the concern, was it? A. Yes, sir.

Q. 34. Did you receive the orders?

(Testimony of William L. Bell.)

A. Yes, sir, I received the order. I received the order, and whether there was a written confirmation I don't remember.

Q. 35. No; you don't understand me. Did you receive the orders from customers? A. Yes, sir.

Q. 36. And you don't know now whether there was a written order or not?

A. I could not say whether there was a written order; no.

Q. 37. What was the common practice in your business: To receive written orders or—

A. Receive them both ways. Receive a good many orders verbally. Usually for a machine of that size we received a written order.

Q. 38. I don't understand you now as swearing, that you did receive an oral order from Mr. Hooker.

A. Yes, I received an oral order, but I am not positive about whether it was confirmed by letter.

Q. 39. When do you say you received that order?

A. I have not looked up the date. This came on me rather suddenly or I might have looked up the date. I can look up the date of the order.

Q. 40. Well, was it at the time of this conversation you speak of in which Mr. Hooker claimed that he was entitled to the machine as the inventor?

A. Yes, sir; at that time. I don't know that Mr. Hooker said he was the inventor, but he said he was the man that had furnished the money to develop the machine and make the drawings.

(Testimony of William L. Bell.)

Q. 41. You testified on your direct examination that he said that he had developed the machine and that Mr. Pardy had made the drawings and assisted him in working it out. Is that right?

A. Yes, sir. I don't know whether Mr. Hooker suggested about making the plans, but—He didn't explain all those little points to me. But the impression I had from him was that he bore the expense of developing the machine.

Q. 42. Well, you have given his conversation to the best of your recollection?

A. To the best of my knowledge.

Q. 43. Was Mr. Hooker present in your place at all during the manufacture of this machine?

A. I can't ever remember—I can't remember any particular time of his being there; no, sir.

Q. 44. Well, was he there at all?

A. He has been in our works a number of times, but I could not say whether he came in while that machine was being manufactured or not.

Q. 45. You won't swear that he was not?

A. No, sir; I would not swear that he was not, or that he was.

Q. 46. Did he during the construction of the machine make any suggestions as to the manner of construction?

A. We made a drawing of the machine, and that drawing was, before it was finished, in pencil form. My recollection is it was submitted to them and little feat-

(Testimony of William L. Bell.)

ures, points, gone over to make it as strong and practical a machine as possible.

Q. 47. By "them," you mean whom?

A. Well, Mr. Hooker, and the superintendent of the shop—foreman—called during the discussion; and also the man who had run the other machine, who had charge of the machines.

Q. 48. Well, did those suggestions made by them relate solely to dimensions, or also to details?

A. I think they were mostly dimensions.

Q. 49. You think they were partly as to details?

A. I should say—I can't remember details. I remember dimensions.

Q. 50. You will not swear that he made no suggestions as to details? A. No. sir, I would not.

Q. 51. How long did it take to construct the machine? A. Why, I think about sixty days.

Q. 52. You made your drawings after inspecting the original machines, I suppose? A. Yes, sir.

Q. 3. The drawings were made practically from those first two machines? A. Yes, sir.

Q. 4. (By Mr. HARPHAM.) And the machine was substantially the same machine as those two first machines, except larger and stronger? A. Yes, sir.

Mr. HARPHAM.—That is all.

Mr. VAN COTT.—That is all.

Mr. HARPHAM.—Complainants close their case.

(Testimony of J. D. Hooker.)

It is stipulated by and between the solicitors for the respective parties herein that the reading, correcting and signing of their depositions by the witnesses respectively deposing, are hereby waived.

J. D. HOOKER, a witness produced on behalf of the defendant, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, deposed as follows:

Direct Examination.

(By Mr. VAN COTT.)

Q. 1. What is your full name?

A. John D. Hooker.

Q. 2. Where do you live? A. In this city.

Q. 3. And have resided here how long?

A. Nineteen years.

Q. 4. What is your business?

A. At the present time, it is plumbing supplies and pipe business.

Q. 5. You are the president of the J. D. Hooker Company? A. Yes, sir.

Q. 6. Defendant in this suit? A. Yes.

Q. 7. Prior to the organization of that company did you conduct the business yourself? A. Yes, sir.

Q. 8. As the sole owner of it? A. Yes, sir.

Q. 9. You are, of course, familiar with the machine involved in this litigation? A. Quite so.

Q. 10. For pipe riveting? A. Yes.

(Testimony of J. D. Hooker.)

Q. 11. Now, will you state generally the nature of the work you do in riveting pipe?

A. Commencing at the cutting the sheet?

Q. 12. Yes, sir.

A. Well, the first thing we do when we take the sheet, is, it goes to the shears. The shears are set to pattern. The man running the shears cuts the sheet to the size.

Q. 13. You mean by "the sheet," what, Mr. Hooker, please?

A. Sheet of steel. It is thirty by eighty-four usually. Now, if you are making four-inch pipe you cut it one length; if you are making six-inch pipe it is another. It is cut to the gauge. After being but it is passed over to the gang punch, and there the man who runs the punch puts it on the gauge that the foreman has set and punches the holes on both ends, both sides of the sheet. From there it goes to the rolls and is turned on the rolls, to the line there set, to make whatever sized pipe they are making—four, six, eight or ten inches. Then from there it goes to the riveting bar. The riveter takes the sheet, takes the section, and turns it, rounds it up with his hammer; tacks both ends, puts two tack-rivets, one at a third and one at two-thirds the distance.

Q. 14. Let me stop you right there and ask you to explain what that riveting bar is.

A. The riveting bar is a long piece of iron, round iron, about five feet long, and is anchored to a post that

(Testimony of J. D. Hooker.)

is set in the ground about eight feet, to a piece of timber that is double fourteen inches square.

Q. 15. So that the bar stands horizontally?

A. The bar stands horizontal and gives a surface upon which the riveter can do his work. Now, he takes the joint of pipe from the bar, turns it over and sets the rivets through the holes, leaving the butt of the rivet inside the pipe; and then he slides that back onto the riveting bar, and he turns it over so that all the rivets come and stand up straight, like this (showing) along the bar.

Mr. HARPHAM.—"Like this"—showing a row of rivets with the butts down and the points projecting upwardly.

Q. 16. (By Mr. VAN COTT.) So that the butts rest on this mandrel or riveting bar?

A. Yes. The butts must be inside of the joint of pipe.

Q. 17. And rests on the mandrel or riveting bar?

A. Yes, rest on the mandrel or riveting bor. Now, he takes the riveting hammer and he drives that rivet down to make a head.

Q. 18. (By Mr. HARPHAM.) By "that rivet" he means the end rivet.

A. All the way, each one in turn. He drives that down to set out the head, and then when he gets the head down he puts the set over it and strikes that down in order to draw up the rivet as tight as possible and

(Testimony of J. D. Hooker.)

to spread out the head over the pipe. He follows that out in turn clear the whole length of the section of pipe. Now, that being done, he takes one end and spreads it out with his hammer to make a female end of it; then he turns to the other end and he turns that in to make a male end of it; because it is driven pipe and it has to be driven one section into another about an inch and a half or two inches. Then the straight seamer, who has made the straight seam, passes it on to the ground seamer. Do you want the round seamer?

Q. 19. (By Mr. VAN COTT.) No, I don't think that is involved in this case. That is the process of riveting which was used in your shop? A. Yes, sir.

A. Yes, sir.

Q. 20. At the time you were running the business and prior to the introduction of this machine?

A. Yes, sir; is to-day.

Q. 21. (By Mr. HARPHAM.) That is hand-riveting?

A. Hand-riveting.

Q. 22. (By Mr. VAN COTT.) Now, when did you first pay any attention to the question of riveting by machine, approximately?

A. It was about January or February—January of 1887, I think.

Q. 23. Well, now, I wish you would state what you did in reference to riveting by machinery.

A. Well, now, the men struck on me. My riveters, my seamers, my straight-seamers. It takes four

(Testimony of J. D. Hooker.)

straight seamers to keep one round seamer busy. Consequently the number of straight seamers is two to four on small pipe. The cutting of the pipe was mechanical; any body could do it. The punching of the pipe anybody could do; the rolling of the pipe by boys, the passing it to the straight seams—there was hand work. Now, I set about seeing if I could not devise some machine that would get away with Mr. Straight Seamer and do that work. I knew the Risdon Company at San Francisco made large pipe and used hydraulic power. But in using the hydraulic power they also used large hot rivets. Our riveting work was all cold rivets. I studied the matter over in various ways. The round seam bar has over it a rivet—a punch carrier. Here is a picture of it. It runs out here, and there is a punch there. It carries a punch here and set there. Well, I first thought of taking that and making rivet holders all the way through there, set wheels all the way through there. But in that I would gain not much, because it would take longer to set those rivets by using that bar than it would to do it by hand. So I put that aside. Then I thought of using air, the air hammer. But that would be rivet by rivet, rivet by rivet, rivet by rivet, and that would be no expedition. Then I was stalled. But I had seen the car-wheels out back of the works on the siding smash pieces of iron.

Q. 24. On the railroad track, you mean?

A. On the railroad track, freight-cars. And I took rivets like this and put them out on the track and let

(Testimony of J. D. Hooker.)

the car run over them and saw what effect it would have. Well, it would smash them down and smash them off sideways. That would never do for plain riveting. But I conceived that if we put the rivet set through the bar that we had on the round seam stick, like this, and let that wheel run over it, that necessarily the set must go down straight, it could not get away from it.

Q. 25. Now, stopping right there, will you describe that bar a little more closely, the set bar?

A. The set bar on the riveting—

Q. 26. Yes. I mean the one that you conceived the idea of making.

A. Well, it was a long piece of iron, steel, with holes bored in it.

Q. 27. At regular intervals?

A. At regular intervals, just the distance of the punch. It had to conform to the punch.

Q. 28. Yes, and consequently to the holes in the pipe?

A. Yes, the holes in the pipe.

Q. 29. (By Mr. HARPHAM.) Through which the rivets went?

A. Through which the rivets went. Now, to take a bar and make holes so that a rivet set would just come fair over every rivet along in a row, and let those stand up that way and go along and smite them with a hammer would not save any time. The only way I saw to do was to use a rotary motion upon it that would set it down one at a time but still be active. I also thought

(Testimony of J. D. Hooker.)

of taking the principle involved in a piano punch, which we use, to set those rivets all at one time, the same as we punch the holes all at one time. But a punch is set like your fingers, one is long and one is short, another is long and another is short, so that when the punch comes down one goes in, another goes in, another goes in, alternately, and they all reach down through the pipe and you are only punching about four holes at a blow; whereas if you put them in with a single power, the power would be so great it would break your machine. So I could not do that. The only thing, then, that I saw, was if I could get that wheel to run over the top of these sets, well, I thought it over, and then I went to San Francisco and went to Risdon's—

Q. 30. (By Mr. VAN COTT.) Let me ask you one question there. Had you at that time considered how the wheel was to be confined so as to produce the pressure without jumping off the work?

A. No; I hadn't got to that point yet. I was getting at the principle. That was a matter of detail, but the principle was what I was getting at. So I went to San Francisco and I went to the Risdon works to see if they could give me any light. They could not. They showed me their own riveting—hydraulic—but that was for big-diameter pipe. Down here we use small pipe. Then I went out into Hayes valley, where a party had been trying to make a riveting machine by the use of air. But it was a failure, and so I set that

(Testimony of J. D. Hooker.)

aside. Then it occurred to me—now, shall I take up Pardy?

Q. 31. Well, take it up chronologically.

A. When, I met him?

Q. 32. Oh, no, it is not necessary. You had met him before this, had you?

A. I had known him for forty years. He was a frequent visitor at my house, and very intimate with my family. I had known him in the Pacific Iron Works. Being a dealer in iron we naturally came in contact frequently.

Q. 32. Yes.

A. And I had applied for patents through him and obtained them. One was a jack for handling redwood logs, which was used in Humboldt County. And he also obtained a patent for me for the cutting of this pipe. I threw things in his way, because he was a man that was sickly, and afflicted with asthma; could not stand confinement; and he eventually left the Pacific works and went and took an office untown to do patent business.

Q. 33. That was up town in San Francisco?

A. In San Francisco. Now, knowing him so well, knowing him to be a draughtsman, knowing that he had to do with mills, quartz mills, and that class of material, I went to him and told him my situation and asked him if he could give me any light. He said the proposition was a new one to him; he didn't know anything about the riveting. I tried to explain to him what I

(Testimony of J. D. Hooker.)

wanted to do, but he was unable to comprehend me, so I said, "Just come right along with me down to Los Angeles, and I will show you just what I want. I do riveting there, and I can outline to you just what I want to accomplish." So he came down me, and stayed at my house a week or ten days. I took him to the factory daily. I cut up the sheets of iron, steel, rolled them, punched them, had the riveting men show him how they set the rivets down, the round seam, and how it was put together; and I showed him the straight seam was the thing I wanted to accomplish—some means of setting it down. I told him what I had done. And then I outlined to him the movement of a car wheel over the railroad track, and why could not a car wheel run over that beam, or a power that was equivalent to that, and set that rivet down? And I outlined to him that there was the riveting bar itself in position, there were the rivets sticking up; now, put a rivet-holder over those as I had outlined there and deliver the power.

Q. 34. You mean a set-holder?

A. Set-holder. Did I say rivet-holder?

Q. 35. Rivet-holder. Set-holder?

A. Set-holder. To put a power over that to crush that down at one blow as hydraulic riveter puts it down at one single blow, was what I wanted to accomplish; and I thought that by the use of the car wheel on the solid axle, the same as the bar wheel has, driven over it with a pressure, would accomplish it. I sketched it out and worked it over with him, and he said he thought

(Testimony of J. D. Hooker.)

that he could put that stuff together if he had it where he could supervise it daily, and if I would let him take it back to San Francisco, me to pay the bills and pay him for his time, that he would undertake the construction of a machine.

Q. 36. Let me ask you a question right there. At that interview, that first interview, with him in your shop, what, if anything, was said about this overhead rail?

A. That was discussed, to get the power there.

Q. 37. Yes. Well, who suggested it?

A. Well, I suggested it to him. I suggested it to him. Simply an eye beam, just an eye beam put over there the same as you have seen in rolling mill works. They are high, one roll above the other, the upper roll forcing down to make it flat. You make it flat by the upper roll coming down smack on that. That is held at the ends. Now, then, why could not that same power be applied to these rivets? It could be—

Q. 38. Well, now, in other words, at that time you suggested to him this wheel and carriage, with the overhead rail and rollers adjusted in some way at the top of the carriage to confine the wheel to the work.

Mr. HARPHAM.—I object to that, on the ground that it is leading.

Mr. VAN COTT.—Perhaps it is. I withdrawn the question.

Q. 39. What I want, is, not to put any words in your

(Testimony of J. D. Hooker.)

mouth, but I want you to state in detail what parts of this machine were discussed or suggested by you, if any, at that time, to Pardy?

A. Well, the bar was taken up. That was settled.

Q. 40. The set-bar?

A. The bar. The riveting-bar?

Q. 41. Yes.

A. The method of holding the sets over the rivets was taken up, and that was settled; he could work that out. Now, then taking up the wheel and running it over those sets—that was settled. Now, then, to get the power to crush the rivets was the proposition.

Q. 42. Yes.

A. Now, then, how were we going to get what wheel down there? Simply follow out the mechanical operation of a rolling mill.

Q. 43. Yes.

A. Get that power down by a roller above, so—the wheel passing over the rivets was rolling one way. You could not put it on the top of that, because if you did we would have a reverse motion on the plate above.

Q. 44. Yes.

A. Necessarily you must construct a carriage that the wheels would turn by themselves independently of the crushing wheel. Now, then, if you put an eye beam over that and let that car run bottomside up and carry the wheel below, you have got the power.

Q. 45. Yes.

A. Do you get the idea? To regulate the power the

(Testimony of J. D. Hooker.)

boxings over the wheels must be loose and be shimmed to whatever size of iron you might be riveting. If it was eighteen iron it would have to be shut down closer; if it was sixteen iron it would have to have more space; if it was fourteen iron it would be regulated by shims of this character.

Q. 46. Well, now, explain in the record what you mean by "thin sheets of steel"?

A. What I mean by thin sheets of steel, number eighteen is thin. Number sixteen is next heavier. Number sixteen is one-sixteenth of an inch in thickness. Number fourteen is next. In United States gauge. I am speaking of the steel in United States gauge. Number ten, eight, twelve and all those things, are those parts of inches. The thin sheet would be eighteen. The next would be sixteen, heavier; the next would be fourteen, heavier.

Q. 47. The purpose of those shims was to bring the—

Mr. HARPHAM.—Objected to, on the ground it is leading.

Q. 48. (By Mr. VAN COTT.) Well, the purpose of those shims is what?

A. To regulate the distance between the eye-beam against which the power was delivered, to the rivet below.

Q. 49. Yes.

A. You could not do it in any other way that I know of. So that was all agreed upon. Now, then, came the

(Testimony of J. D. Hooker.)

idea of how are you going to move that wheel. The old-fashioned planer solved that at once. You carry that wheel along with just the same screws that you would carry an ordinary planer—back and fourth, back and fourth—applying your power on the gear. That settled that point. Now, apparently, that would accomplish it; and so I was willing to make the venture to see if he could accomplish it. Pardy claimed that if he had it under his supervision up there, that he could see that the work was well done, and I could send him up two or three joints of the pipe and he could have it riveted up there and see how it would work, if it would work at all. So I sent him that—he went back to San Francisco, and he selected a firm by the name of Rix & Kittredge to take up and manufacture this machine under his supervision, myself paying the bills and guaranteeing the account. They were to take their instructions from Mr. Pardy. That machine was made and brought down and put in place. Mr. Pardy came down with it, because he wanted to see it work. But it was unsuccessful.

Q. 50. Now, let me stop you right there. In this conversation which you had with Mr. Pardy and in which you say you outlined these various features of the machine to him, did he at that time make any suggestions, and, if so, what, of specifications for the features that you had proposed?

A. No. Well, I was not satisfied to let the machine stand as it was. So I took the machinist from the ma-

(Testimony of J. D. Hooker.)

chine shop, and together with—myself together with the machinist that riveted these sections, and fixed the bar. The bar that holds the rivet-set would slide off one side and set the rivet in a diagonal shape. That would not do. So the machinist put a holding-pin to keep it in a straight line.

Q. 51. Now, right there, let me call your attention to figure one in this copy of the letters patent involved in this suit, and ask you to locate on figure one the position of that pin?

A. Well, it would be behind that bar, right in there. (Showing.)

Q. 52. Right in here?

A. Yes. That bar you see opens this out. This is the riveting-bar; there is a hinge there; and there is the point of the pin.

Mr. HARPHAM.—Bar b.

Mr. VAN COTT.—The riveting-bar is marked A.

Mr. HARPHAM.—A.

Q. 53. (By Mr. VAN COTT.) A. Is that right?

A. Yes.

Q. 54. And it was at the end of that riveting-bar, beyond the second bar from the right in the frame—second bar from the left in the frame, that the pin was set, was it?

A. The riveting-bar comes out here. You see it extends out there. (Showing.) There is no holes through

(Testimony of J. D. Hooker.)

it here. But in there, just outside of the rivet-sets there, there was made a hole and a pin was set into the riveting-bar sticking up—or into the riveting-bar sticking down, and that pin entered a hole in the set-bar—

Mr. HARPHAM.—B X.

Q. 55. (By Mr. VAN COTT.) Marked B X, and prevented the set-bar from having lateral motion.

A. That is the idea.

Mr. HARPHAM.—The pin referred to is 19?

Mr. VAN COTT.—No, I don't think it is.

Mr. HARPHAM.—Yes, there it is.

Mr. VAN COTT.—That is right; 19.

Mr. HARPHAM.—And shown in dotted lines?

Mr. VAN COTT.—Yes.

Q. 56. Now, I understand you that that pin was put in by your machinist at the shop upon your discovering this lateral movement in the set-bar?

A. Yes.

Q. 57. Where was Mr. Pardy at that time? Was he in Los Angeles?

A. San Francisco. He had very little to do with the working of the machine. Nothing. The whole working out of the utility of the machine was done with Mr. Stellow, the machinist.

Q. 58. That was the machinist who suggested putting this pin in there?

(Testimony of J. D. Hooker.)

A. He is the man who suggested that.

Q. 59. Well, now, proceed?

A. Then we made some pipe and set it out into the field. But when we got it into the ground and put water into it it leaked, showing that the riveting was imperfect. We had to take it up and bring it back to the shop and run it over a round bar of shafting and re-set all the rivets by hand set. Then with dipping the pipe it did service. Now, then, to get those rivets down so as to hold the lap down to prevent leakage through. Mr. Stellow worked at that faithfully with me, and we put on all the power the machine would stand; and after the section was riveted it was taken to the riveting-bar —hand-riveting bar, and the inside lap was laid with the side of the hammer and the outside lap was laid with the side of the hammer, and the bell-end turned out and the spigot-end turned in. By that means we made a tight pipe; and we worked at it until we could turn out about two hundred joints a day of four-inch pipe, single riveted—a single row of rivets. Now, to do that it took one man to tack the joints; it took a boy to put the rivets inside the joint, to pass it on to the machinist, who ran the bull—riveting machine. The boys call it the bull. That was the third man. Now, when we had taken it off from the machine, it went to the fourth man to lay the laps, bell out the bell-end and turn in the spigot-end. That took four men. Now, four men, on the ordinary stakes, would turn out daily seventy-five joints each, which would be three hundred joints.

(Testimony of J. D. Hooker.)

Evidently that was a losing game. So the machine was side-tracked for a time. But frequently now and then we would take it up and work with it again; and this thing we developed.

Q. 60. Now, by "we" you mean who?

A. I mean the shop men. When I say "we" I mean Mr. Stellow and myself.

Q. 61. Yes.

A. We at the shop sought to hold down the laps, the inside lap and the outside lap, by the bar that was on the side of the rivet—the set-holding bar; and at the same time, being held firmly down by the carriage from above, the riveting wheel came along over it. Mr. Stellow claimed that it was too light to do very much work with it, and I agreed with him. But he claimed that if he could have a heavier machine made as we had talked it over that he could make it run to a success.

Q. 62. By "we" you still mean Mr. Stellow and yourself?

A. Stellow and myself. When I say "we" I mean Stellow and myself. For the machine we would set one row of rivets. All pipe six-inch and above was double riveted. There is where the majority of our work was. Now, then, if we could make a larger machine and put in a double row of rivets, because the hand-riveter would require twice the time to set a joint with double rows than he would a single row—we therefore doubled up on the hand-riveting. So, having waded in that distance, I concluded that I would venture another ma-

(Testimony of J. D. Hooker.)

chine and have it made by Mr. Robbins, of San Francisco, because he was the man who made punches for us, who made shears for us, and to whom we sent for tools, and was a regular manufacturer of tools for the making of pipe and working in light iron. I agreed with Mr. Robbins to pay the bill, to let Mr. Pardy oversee the work, and he should be paid along at times as the work went on; and, as the work went on Mr. Pardy asked for the money and I sent it to him, and it was paid to Mr. Robbins, and he handed me a bill receipted in full.

Q. 63. Now, when you were developing the double-row set-bar, where was Mr. Pardy?

A. Why, he was in San Francisco.

Q. 64. And did you consult him at all with reference to that? A. No, he was not where I could.

Q. 65. Now, proceed.

A. Mr. Stellow and myself knew very well that the rivets must stand true and in double line. To do that there would have to be a steel plate put onto the riveting bar, because the soft iron of the stake would give way. So, Mr. Stellow suggested that we channel out the riveting bar and insert a piece of steel so that the head of the rivet should rest upon that bar, and in double rows; that we could just as well set down two rows at one time as another; that to be sure the rivets would stand up straight and slightly flatten the pipe—which it does—nevertheless by giving sufficient lap to the piece of pipe when we cut it we would have room

(Testimony of J. D. Hooker.)

to lay the laps both inside and out and still have double work. In putting it together it would have to be rounded at both ends, belled at one, and make a spigot-end at the other. Mr. Pardy came down. We went over the matter with him, with Mr. Stellow—I mean Mr. Stellow and myself. I took him to the factory and showed him what we had worked at, and he went back and started this machine here, the letters patent, which is the outgrowth of our experimental work with the little machine.

Q. 66. Well, at the time he came down this second time, you explained to him your idea about the double bar, double set-bar.

Mr. HARPHAM.—Object to the question, on the ground that it is leading.

Q. 67. (By Mr. VAN COTT.) State what was said.

A. My object in bringing Mr. Pardy down was that he should confer with Stellow and see what we had accomplished with that other machine; and therefore I brought him down. And we went over the method of putting in a machine to rivet in double rows, and then he went back with the gatherings that we had given him of the way we wanted the thing to do and put the machine together. While both these machines were being made I made frequent visits to San Francisco to see that our—my ideas were being carried out. When the machine was done it was brought down and put into the factory, and I again brought Mr. Pardy down that

(Testimony of J. D. Hooker.)

he should see that we gave the machine a fair show and that he could show us where any defect, or we could show him where there was any defect, in the construction. He came down, and stopped with me every time he came down; looked the machine over and went back. Mr. Stellow took the machine up with me and we went to work, and little by little we perfected it so we could turn out tight pipe.

Q. 68. By "we"—

A. I mean the factory. Our factory could turn out tight pipe.

Q. 69. What I want to get at is, you confine that "we" to yourself and Mr. Stellow?

A. Yes. Well, the factory. I owned the factory, and when I speak of "we" I mean the works.

Q. 70. You don't mean Pardy?

A. No. Pardy is not in it. He is not anywhere in it. He is a thousand miles away.

Q. 71. Yes.

A. Now, then—let me ask if I shall now take up that—if I may—the method of going over and coming back.

Q. 72. I was just going to call your attention to that.

A. We found in the machine that if we set it over this way to do heavy work it would get stalled, being shimmed down too close. That would stop the work, and we would have to run it back. When we ran the machine out over the shim the first time and took it back it was idle work taking it back; it did no work.

(Testimony of J. D. Hooker.)

So Mr. Stellow shimmed it lightly going out, and as it had to go back and he could just as well go back with power he put in shims to carry it down so that it would do half the work going out and half the work coming back. He made the double motion on it and he did it by means of shims, and it lost no time and did better work; and by that means we got the rivets set down tight in most of the pipe.

Q. 73. When and under what circumstances were the automatic shims to accomplish that purpose first introduced into the machine?

A. The Automatic?

Q. 74. Yes, sir.

A. Well, just when that was done I don't know.

Q. 75. Shown on figure six.

A. But it was done by Mr. Stellow. Because of his having to pick up the shims and put them in by hand, he thought a machine could be made there, an automatic matter could be made there that would throw in on the return; and he developed the holding it down on the return; he put those shims in there. Just where that automatic business came in I don't know.

Q. 76. But you are quite certain that he did it?

A. Oh, yes. His idea.

Q. 77. By the device shown in figure six?

A. That is the idea.

Q. 78. Numbered fifty.

A. That is the thing.

Q. 79. Fifty-one and H. That is right, is it?

(Testimony of J. D. Hooker.)

A. That is right.

Q. 80. Now, let me call your attention to figure one, a hook at the end of the riveting bar or mandrel, marked sixteen, and swinging on a pivot marked eighteen, and ask you what its purpose is, and when it was introduced, and by whom, on that machine.

A. The first machine that came down had no method of holding the bar down; and when the wheel came over onto the bar and started to roll over to set the rivet that end of the bar would pitch up with the pressure upon it. So Mr. Stellow took a stick of wood and he put it against the beam above, resting on the bar below, which prevented it from coming up.

Q. 81. That is, at the end of the bar at which you introduced the work?

A. At the end of the bar at which we introduced the work, yes. And I talked it over with him one day. "How can we get rid of that bar, that stick of wood you have got sticking up there?" So we talked it over, and he suggested putting in the catch there, by putting in at the end of the hold bar a bolt, a machine bolt with a square head, and then at the end of the bar he rigged a catch that comes down and catches under the head of the machine bolt and holds it there. When this machine was made that same idea was carried out on this machine, only on the side of it.

Q. 82. By "this machine" you mean the last machine made? A. The last machine made.

Q. 83. Now, let me call your attention to figure one,

(Testimony of J. D. Hooker.)

a prop marked 10, 12, apparently 2. I ask you what the purpose of that is. No, ten; then, that is it. I ask you what the purpose of it is and when and by whom that was introduced?

A. The purpose of it is to give strength and rigidity to the bar.

Q. 84. The riveting bar? A. The riveting bar.

Q. 85. Yes.

A. We had used that in the shop, the same idea, holding both ends of a bar over which we had slid pipe, because if you only hold one end the point of the bar would give way, and necessarily some support must be put under there, and a swinging bar was put in the machine to come up under that riveting bar and hold it, hold against the pressure after the pipe had been put on.

Q. 86. Let me see. What is the pressure exerted by that wheel in passing over the riveting bar and rivets?

A. We run it out with five thousand pounds on this machine, and back with ten thousand pounds.

Q. 87. And the tendency of that five or ten thousand pound pressure would be to sag the unsupported end of the riveting bar, and you put that support in there to prevent that result. That is right, is it?

A. That is right. Yes, sir.

Q. 88. Now, I ask you when and by whom was that that feature of the machine introduced?

A. Why, in the first machine. In the first machine.

Q. 89. That was on the first machine?

(Testimony of J. D. Hooker.)

A. Yes, sir. We must have the bar supported in order to get the pressure.

Q. 90. Well, who introduced it A. I did.

Q. 91. Now, has any machine in your shop, among these three, I mean, ever had this lever and chain to actuate that supporting bar?

A. No, sir. I never saw it.

Q. 92. Well, now, proceed, Mr. Hooker, please. I would suggest that you come down now to the experiments with reference to the rim of the wheel.

A. In setting down the rivets, sets were used of this character (showing). The wheels passing over them would split them off, because they were so hard, and the rivets would be broken. It was a difficult matter to get them tempered just right, and I had great difficulty in finding a person who could make them with the correct temper—and I have not found him yet. Now, the pressure from the wheel being exerted upon that set caused the edge of the wheel to split off. The riveting wheel was made of chilled iron, and case-hardened, but it was not of sufficient strength to withstand the pressure. So I had the wheel taken out and about two inches of it turned down on the periphery and a tire shrunk on there of cast steel. That idea originated to me in this way: The drivewheel of a locomotive has a steel tire upon it, because it does the hardest work on the train. I reasoned that if I applied the same tire to that wheel I should get better results. That was true,

(Testimony of J. D. Hooker.)

for the wheels are used to-day with the steel tire shrunk on.

Q. 93. Where was Mr. Pardy at the time that you completed that idea? A. San Francisco.

Q. 94. And did you consult him at all with reference to it?

A. No. Told him about it. I made frequent visits to San Francisco on matters of business, and always dropped in to see him.

Q. 95. How is the carriage of this machine containing the roller that does the riveting guided to prevent lateral movement?

A. You mean the riveting wheel?

Q. 96. Yes, sir.

A. That is contained in a carriage of four wheels, and the four wheels run along the outside of the riveting bar—of the rivet-set bar, running along on side pieces screwed onto it, and those keep the wheel in the channel over the rivet-setters in the rivet bar.

Q. 97. When and by whom was that feature of those side bars on the rivet-set bar introduced?

A. That, my recollection is, was done by Mr. Stellow.

Q. 98. After the first machine had got there?

A. On the first machine?

Q. 99. On the first machine?

A. On the first machine. This machine is evolved from the first machine.

Q. 100. Well, now, what other difficulties had you

(Testimony of J. D. Hooker.)

with the machine, and, if any, please state how they were overcome and by whom?

A. When anything went wrong the machinist who had it in charge corrected it, or called my attention to it and suggested what could be done, and he had my permission to go ahead and carry out what he deemed should be done. There were many minor details about it that I don't now recall.

Q. 101. They were mere details?

A. They were mere details.

Q. 102. Details of mechanism, and had nothing to do with principle of operation, did they?

A. No. The object was to set those rivets down tight so we had tight pipe.

Q. 103. Now, Mr. Hooker, what, if any, conversation did you ever have with Mr. Pardy relative to letters patent on this machine?

A. Well, he had suggested at times that I take out a patent.

Q. 104. That you take out a patent?

A. Yes. He was a patent lawyer, and of course wanted business. And I wanted to help him. But I said there was no use to take out a patent on it because it was not worth patenting; that up to that time hand work would make it cheaper than machine riveting. We laid some pipe. And it was leaky, and it came to the point where engineers would specify in their specifications "hand-riveted work," barring us, because we used machine work; and we took contracts guarantee-

(Testimony of J. D. Hooker.)

ing that all the work should be hand work. But nevertheless we kept at—I kept at the machine to perfect it to do the work, because I could see no reason why we should not have a good return out of the machine in the prosecuting of our business. The machine was for the purpose of carrying on our business. I didn't seek to have a patent on it because I didn't want to make a machine to sell it; that was not the idea at all. It was to further my industry and turn out with rapidity the best pipe on the face of the earth, which we succeeded—which I succeeded in doing. I defy anybody to make a better piece of pipe than the J. D. Hooker Company. Pardy frequently spoke about my taking out the patent. I objected. I said, "You will have to have a model, and the cost of the model will be three hundred dollars, maybe." "Well," he said, "no, he could make it with detailed drawings." "Well," I said, "Suppose you should get a patent on it. I don't want to sell the machines to anybody. Nobody wants to buy them. There will be no profit in it. And suppose I had a patent. As I understand it—"

Q. 105. Well, do you mean by that "suppose you get a patent," to intimate that he should take out a patent for himself.

A. Of course—not to himself.

Q. 106. No.

A. Not to himself.

Q. 107. That is what I mean.

A. Not to himself. Simply as my agent all the way

(Testimony of J. D. Hooker.)

through was Mr. Pardy. I understood that if anyone wanted those machines as a manufacturer and I had none for sale, that he had the right to go and have one made for his own use as against anything I might do. Therefore, having a patent on the machine, for me, would be no advantage to me that I could see. And I never made applications for taking out a patent, although Mr. Pardy frequently asked me to do it. He was hard up for money, and he said that he could make the drawings for an application, if I would let him, for sixty dollars. I let him have sixty dollars and told him he could make his drawings at his convenience and we would take the thing up later. He never did make those drawings, so far as I know, for I saw him once or twice after that; I believe but once; although I sent him money; and I think the last time that money was sent him was when he was wanting to go up into the Sierras among the pines where he hoped to get relief from his asthma. He went up there, as I remember, staying a month or two, and came back to San Francisco, went to his room on Bush street and never came out alive.

Q. 108. Now, what, if anything, was said by either of you with reference to his taking out a patent for himself.

A. He said that he could take out the patent in his name if I wanted. I said, "How can you do that"? "Well," he says, "if you don't object there is nobody to stand in the way of it. I can take out the patent in

(Testimony of J. D. Hooker.)

my name and assign it over to you if you want to, and I make my fee." I told him we would see about it later. And that was the time—about the time that I told him he could make the drawings. He never claimed the patent to the machine that I know of; never pretended to to me.

Q. 109. By that you mean he never claimed to be the inventor of the machine?

A. Never. So far as I know.

Q. 110. Are you acquainted with Mr. William L. Bell, Mr. Hooker, of this city? A. Yes, sir.

Q. 111 How long have you known him?

A. Oh, known him ten years, I guess, or so; ever since he has been in town. Near neighbor.

Q. 112. What, if any, connection had he with the building of either of these machines in your shop?

A. He built one for me, at my instance, the large machine.

Q. 113. Well, what position had Mr. Bell with the Fulton Engine Works?

A. Manager; general manager.

Q. 114. He has testified in this case, as follows: "Mr. Hooker sent for me to come over to his works, and explained that he wanted to build a machine of a larger size than two machines that he already had in use; and he said that the two machines that he had in use that he had developed—developed those machines with the assistance of Mr. Pardy, George Pardy, who had come

(Testimony of J. D. Hooker.)

from San Francisco, as I recollect, and had made the drawings and plans to suit the conditions of his—the requirements of his work, and that some time after these machines were built that Mr. Pardy had applied for a patent on this machine." Now, calling your attention especially to the language "And that some time after these machines were built that Mr. Pardy had applied for a patent on this machine"; I ask you whether you ever said that to Mr. Bell? A. No, sir.

Q. 115. Did you have any conversation with him concerning the patent on the machine?

A. I did.

Q. 116. What was it?

A. I told him, as he knew, that a patent had been taken out, but by the successor or brother of Mr. Pardy; that Pardy had no interest in it.

Q. 117. No interest in what?

A. In the building of these machines.

Q. 118. Yes.

A. That I wanted he should build me what I wanted him to, and he agreed to do it, and he did it under my supervision, and Mr. Stellow's suggestions; made his own plans for it. I didn't want to go and have Mr. Robbins build it; I wanted it built under our own supervision, and he built the machine.

Q. 119. Now, I call your attention further to the language; "That Mr. Hooker considered that he was the one who had the ownership of the machine, and that he

(Testimony of J. D. Hooker.)

wished to have a figure from me to build this larger machine, and that if there was any claims made against us for any royalty on these machines that he would pay all such claims."

A. I told him I would. The machine was mine, and I didn't propose to be put down that way. Everybody understood it was my machine; known as my machine.

Q. 120. By "my machine" what do you mean?

A. That I was the inventor of it.

Mr. VAN COTT.—You can take the witness.

The further taking of this deposition was now adjourned until Saturday, January 14th, 1905, at 10 o'clock A. M.

J. D. HOOKER, recalled.

Direct Examination Resumed.

(By Mr. VAN COTT.)

Q. 121. I call your attention to page 2 of the specification of the letters patent in suit, between lines 45 and 50, as follows: "In setting the piece of work it is fixed and held by a tapering pin, 20, on the bottom of the set-bar, so placed that it shall take into the last hold in the line of rivet-holes from which the last rivet is omitted until the next joint of pipe is joined to it and the round seam is riveted up." When was that pin put into the machine?

A. Well, during the experimental work. Now, do you mean that holds the bar or holds the pipe?

(Testimony of J. D. Hooker.)

Q. 122. Holds the pipe.

A. You know in riveting a sheet together you have a hole above and below. Now, a drifting pin is as old as the hills. And you get one rivet in there, and then to get the other hole square, you put in a drifting pin and pull that up. He took that idea and made a drifting pin and put it in that held the hole square at the end. That would hold all the others square so that when the wheel that sets down the rivets came along the pipe would not crawl, the holes would all come fair It is simply a drifting pin used in that position, a principle old as time.

Q. 123. Now, then continuing: "At such time of operation, also, the opposite end of the joint is held in place with proper lap by slipping a ferrule or short sleeve over the shank of the last rivet in the line at that end, and this sleeve standing above the rivet enters the hole in line with it in the set-bar, and by pushing out that rivet-set draws the over-lapping ends of the pipe into line." When was that sleeve introduced?

A. That is what I have told you about. He has not got the specification about that correct at all. It is just simply a drifting pin. He has gone away off in that proposition. There is nothing of that character, as he describes there, as I understand it, in the machine. Take a rivet-set and make a punch of the bottom in place of the cup that sets the rivet down, and just drop that in and it goes in through both of the holes and brings the holes square. The riveting bar comes

(Testimony of J. D. Hooker.)

along—that would hardly do; but the later men have cut them off, and the wheel passes right over it now; and when it goes back that hole has not got the rivet in; being at the end of the pipe, it is put in when it comes to the end, and is made into a section.

Q. 124. And that device, you say, was introduced by Mr. Stellow. A. That is Mr. Stellow's.

Q. 125. Is Mr. Stellow living?

A. Mr. Stellow is dead.

Q. 126. When did he die?

A. I think it was in 1893 or 1894; somewhere along there.

Q. 127. Long before the commencement of this action? A. Yes, sir.

Mr. VAN COTT.—Take the witness.

Cross-examination.

(By Mr. HARPHAM.)

Q. 128. You say, Mr. Hooker, that you employed Mr. Pardy to do this work for you? A. Yes, sir.

Q. 129. When did you employ him?

A. As I said in my testimony.

Q. 130. Well, please give us the date again?

A. It was in 1887—the fore part of 1887 is my recollection. Yes, 1887.

Q. 131. What part of 1887?

A. Well, the first part of the year. I should say it was January or February.

Q. 132. What is that?

(Testimony of J. D. Hooker.)

A. January, February or March; first part of 1887. It is fifteen, sixteen years ago. That is my recollection.

Q. 133. (By Mr. McKINLEY.) Eighteen years ago.

A. Eighteen years ago.

Q. 134. (By Mr. HARPHAM.) How long were you engaged in trying to get up a design for a machine of this character before you employed Mr. Pardy?

A. Well, I had worked over it, I guess, for three months.

Q. 135. For three months?

A. Yes.

Q. 136. What agreement did you have with Mr. Pardy in relation to the payment for his services in the matter?

A. Simply I would pay him his charges for the time he was employed.

Q. 137. Did he ever render you any bill for the time that he was employed in the matter? A. No.

Q. 138. Did you ever pay him anything for the time?

A. Yes, sir; overpaid him.

Q. 139. Overpaid him. How much did you pay him?

A. Well, I would be in his office and he would say he was short of money, he hadn't got money to pay his room rent with, and I asked him how much would satisfy him and he would say so much and I would give it to him. I kept no tally of it.

Q. 140. You kept no tally of it? A. No, sir.

Q. 141. You took no receipts for it?

(Testimony of J. D. Hooker.)

A. No, sir. He never made any other demands for money on me except in that way.

Q. 142. How long was Mr. Pardy engaged in this work of designing and perfecting this machine?

A. Well, he was not continuously engaged in it; but he had the charge of it, I should say, three months, looking after it. Some days he would look after it and some he would not. It would only take a few minutes a day to go over to the machine shop and see how the work was getting along.

Q. 143. Who prepared the plans for the machine from which the machinists worked?

A. I sketched out the plans to Mr. Hardy and he took them away with him. He then made the plans mathematically by which the machine was made.

Q. 144. Do you know how long he was engaged in working out those plans? A. No, sir.

Q. 145. At the time that you employed Mr. Pardy to do this supervision, as you state, were there any machine-shops in Los Angeles? A. Yes, sir.

Q. 146. What machine-shops were there here?

A. There was the Fulton Engine Works, and the Union Foundry—Union Machine-Shop, the Baker Iron Works.

Q. 147. Were any of those machine shops competent to do this work?

A. Hardly, for they were not tool makers. In working material, certain machine-shops make a specific business of making tools to a temper which will do work.

(Testimony of J. D. Hooker.)

Q. 148. What part of the machine requires temper in pipe-riveting? A. Rivet sets.

Q. 149. Rivet sets.

A. And the set bar.

Q. 150. That is a very small portion of the machine, isn't it?

A. Yes, but the machine, the sets have to be turned to fit nicely. All the machine work is done to fit closely, snugly, and not give any creeping, and the temper must be good.

Q. 151. Well, the Baker Iron Works and the Fulton Iron Works and the other machine shop that you speak of could do that work here pretty well, could they not?

A. No, sir.

Q. 152. Why could they not?

A. Well, because they didn't have the appliances for doing it.

Q. 153. During the time that Mr. Pardy was at work upon this machine at San Francisco how many trips to San Francisco did you make?

A. It is impossible for me to tell; it is so long ago. I used to go to San Francisco about once in sixty days.

Q. 154. What is that?

A. I used to go to San Francisco about once in sixty days.

Q. 155. Once in sixty days?

A. Sometimes oftener. Depend whether I had business up there to take me there or not.

(Testimony of J. D. Hooker.)

Q. 156. Well, now, what is your best recollection in relation to this matter of the construction of this machine, how many times did you consult with Mr. Pardy at San Francisco in relation to the machine as it was being built, this first machine?

A. This first machine; not the one you have a patent on?

Q. 157. The first machine.

A. The first machine, well, I think I was there four or five times.

Q. 158. Four or five times?

A. Yes, sir; in the Rix & Kittridge shop.

Q. 159. And you say that it took about three months to build the machine?

A. Yes, sir. That is my recollection. It wouldn't take that if they had gone right to work and worked at it, but they built it along little by little, little by little.

Q. 160. Did you make any suggestions to the machinists who were in charge of the construction of the work in relation to how the work should be made?

A. Well, what do you mean by "suggestions"?

Q. 161. Give any directions as to how the machine should be constructed?

A. I explained to them the result that I wanted to accomplish, and laid out that line of old principles, and I wanted them brought into line and work as we had outlined it. Further than that I could not give any instructions.

(Testimony of J. D. Hooker.)

Q. 162. You say that you did this yourself personally to the machinists that were building the machine?

A. Well, I talked it over with Mr. Pardy and the machinist, the man that was building it.

Q. 163. Who was the man that was building it?

A. I would not go beyond Mr. Pardy to give directions over his shoulders. I don't know the men's names who were building it. It was built by Rix & Kittridge. Mr. Rix had something to do with it.

Q. 164. Did you make any suggestions in relation to how the machine should be built to Mr. Rix?

A. Not other than the plan.

Q. 165. You did not present that plan to him yourself, did you?

A. No, sir. Mr. Pardy presented it to him.

Q. 166. And Mr. Pardy made the plan that was presented to Mr. Rix, did he not?

A. He made the plan after the sketches I had given him, following those lines.

Q. 167. Did you explain to Mr. Rix that you were the inventor of the machine?

A. I didn't think it was necessary for me to. I don't remember that I did.

Mr. HARPHAM.—I think that is all.

Redirect Examination.

(By Mr. VAN COTT.)

Q. 168. Did Mr. Pardy, in your presence, ever claim to Mr. Rix that he had invented the machine?

(Testimony of J. D. Hooker.)

A. Mr. Pardy never claimed in my presence any right to the machine.

Q. 169. You have testified that there were no machine shops in Los Angeles at that time capable of building this machine?

A. Not in my judgment. Of course, they have grown since. The fact that the Fulton Engine Works enlarged their plant, got in different talent in it, and were doing work for us, and had accomplished the fact of making a good punch—because a punch is just as essential as a set—and could temper them there, that is the reason I took it up with Mr. Bell to make the larger machine.

Q. 170. Well, the fact is that you selected the San Francisco concern because in your judgment that concern could do it better than any concern here?

A. Yes.

Mr. HARPHAM.—That is rather leading.

Mr. VAN COTT.—Well, that has gone before.

The WITNESS.—That is the fact.

Mr. VAN COTT.—I will withdraw it if you object to it.

Mr. HARPHAM.—It is certainly objectionable as leading.

Mr. VAN COTT.—I will withdraw the question.

Q. 171. You testified, I think, the other day, that you had paid all these bills for the construction of that machine? A. Every one.

(Testimony of J. D. Hooker.)

Mr. VAN COTT.—Well, that is all. We will rest.

Mr. HARPHAM.—I will call Mr. Hooker as our witness.

J. D. HOOKER, recalled, on behalf of the complainant, testified as follows:

Direct Examination.

(By Mr. HARPHAM.)

Q. 1. Mr. Hooper, will you please look at those letters? This letter dated, "Los Angeles, Cal., October 10, 1887," is that in your handwriting? A. Yes, sir.

Q. 2. And is that your signature?

A. Yes, sir.

Q. 3. This letter dated Los Angeles, Cal., October 14th, 1887, is that your handwriting? A. Yes, sir.

Q. 4. This letter of date October 20th, 1887?

A. Yes, sir.

Q. 5. And this of October 22d, 1887?

A. Yes, sir; my handwriting.

Q. 6. And your signature? A. Yes, sir.

Q. 7. This of October 24th, 1887?

A. Yes, sir.

Q. 8. And this of October 26th, 1887?

A. Yes, sir.

Q. 9. And this of October 29th, 1887?

A. Yes, sir.

Q. 10. And this of November 25th, 1887?

A. Yes, sir.

(Testimony of J. D. Hooker.)

Q. 11. And this of December 23d, 1887?

A. Yes, sir.

Q. 12. And this of December 28th, 1887?

A. Yes, sir.

Q. 13. And this sheet which has a pencil date of January 5th, being part of the letter?

A. That is my handwriting.

Q. 14. There is no year on it, but from the context I should judge it was in 1888. This one of January 19th, 1888? A. Yes, sir.

Q. 15. This one of February 1st, 1888?

A. Yes, sir.

Q. 16. This of July 17th, 1888? A. Yes, sir.

Q. 17. This of March 16th, 1888? A. Yes, sir.

Q. 18. This one of 3/19/88? A. Yes, sir.

Q. 19. This one of March 24th, 1888?

A. Yes, sir.

Q. 20. This one of March 29th, 1888?

A. Yes, sir.

Q. 21. This one of April 10th, 1888?

A. Yes, sir.

Q. 22. This one of April 11th, I guess it is, isn't it? I should think so. April 11th, 1888?

A. Yes, sir.

Q. 23. This one of April 30th, 1888?

A. Yes, sir.

Q. 24. This one of July 20th, 1888?

A. Yes, sir.

Q. 25. This one of May 6th, 1889?

(Testimony of J. D. Hooker.)

A. Yes, sir.

Q. 26. And this one of July 23d, 1889?

A. Yes, sir.

Q. 27. And this of July 24th, 1889?

A. Yes, sir.

Q. 28. These letters which I have now shown you, Mr. Hooker, were letters written by you to Mr. Pardy relating to the machine, were they?

A. I think so. There may have been some other things involved in them—punches and shears and rolls.

Mr. HARPHAM.—We will offer these in evidence and ask that they be marked—so much of them as relates to the manufacture of this type-riveting machine. There are some matters that do not relate to that that we don't care to have go in; but all that part of the letters which has any bearing on the structure and manufacture of this pipe-riveting machine we offer in evidence.

Mr. VAN COTT.—We have no objection to such parts of the letters as relates to the making of this machine, of course.

Mr. HARPHAM.—That is all.

Cross-examination.

(By Mr. VAN COTT.)

Q. 29. Now, referring to your letter to Mr. Pardy of July 17th, 1888, you say, "Again, as to the machine. I understand I am to own and control the patent upon their paying you—" what is that?

(Testimony of J. D. Hooker.)

A. Well, it should be "my paying."

Mr. HARPHAM.—Well, "upon them paying you," it is written.

Q. 30. (By Mr. VAN COTT)—(Continuing.) "Upon them paying you a fair and reasonable sum for all your time and labor and what will be just and fair between us." Now, what was the occasion of your writing that to him?

Mr. HARPHAM.—I object to that, upon the ground that there is no ambiguity in the language, and that it speaks for itself.

Mr. VAN COTT.—Answer the question.

A. It is evident to me that we had some talk about the machine, about patenting it. He wanted to take the patent out, and if he had his compensation for his work that is all he could ask, except the attorney's fee. And that is the idea I intended to convey in that.

Mr. VAN COTT.—That is all.

(The letters last offered are marked Complainants' Exhibit 5-L. L. to Complainants' Exhibit 29-L. L., inclusive.)

S. H. GOWEN, a witness produced on behalf of the complainants, in rebuttal, being first duly cautioned and solemnly sworn to testify the truth, the whole truth and nothing but the truth, deposed as follows:

(Testimony of S. H. Gowen.)

Direct Examination.

(By Mr. HARPHAM.)

Q. 1. Mr. Gowen, what is your name, age, and place of residence?

A. F. H. Gowen; age, 49; residence, 436 East Twenty-first.

Q. 2. You are acquainted with J. D. Hooker?

A. Yes, sir.

Q. 3. How long have you known him?

A. Since 1887.

Q. 4. Were you acquainted with George Pardy in his lifetime? A. I was.

Q. 5. How long did you know him?

A. Oh, about two or three months.

Q. 6. What business was Mr. Hooker engaged in when you first knew him?

A. In the sheet steel and pipe business.

Q. 7. Manufacturing steel-pipe? A. Yes, sir.

Q. 8. Did you ever work for him? A. Yes, sir.

Q. 9. How long?

A. Worked from 1887 until 1903.

Q. 10. How long have you followed the business of pipe-making? A. Since 1880—Oh, 1870.

Q. 11. Will you look at those letters patent, numbered 434,677, and state whether or not you ever used a pipe machine like the one illustrated and described in these letters patent? A. Yes, sir, I have.

Q. 12. Where? A. J. D. Hooker Company.

(Testimony of S. H. Gowen.)

Q. 13. When was that machine first used?

A. I think it was in 1888, if I remember right; to the best of my recollection.

Q. 14. Who built the machine, if you know?

A. I don't know. It was built in San Francisco.

Q. 15. Who brought the machine down here?

A. Why, it was brought there to the shop. I don't know. It was shipped to J. D. Hooker Company.

Q. 16. Who put the machine up?

A. Why, Pardy.

Q. 17. George Pardy?

A. Yes. This George Pardy is the one that is dead, isn't it?

Q. 18. Yes, sir. A. Yes.

Q. 19. Were any changes made on the machine after it was put up?

A. Oh, there was adjustments made, I think. There was no material change made in the machine, that is, in the principle of the machine.

Q. 20. Did the first machine that was put up there work? A. Not satisfactorily for a while.

Q. 21. Was it made to work satisfactorily?

A. Yes.

Q. 22. Who made it work satisfactorily?

A. Why, Pardy, with my assistance.

Q. 23. Were any changes made on that machine by Mr. Hooker?

A. Not only in adjustments. The principle—there was no change made in the principle of it.

(Testimony of S. H. Gowen.)

Q. 24. You say that first machine was made according to the plans and specifications shown in these patents?

A. Yes, sir. That is, it appears to me it is. It looks like the same machine.

Q. 25. Well, was that first machine the same as the machines that were subsequently used by Hooker in the pipe business? A. The principle was, yes.

Q. 26. Was there any substantial change in the construction of the machine after it was installed?

A. No.

Q. 27. And you say the first machine was the same in construction as the second and third machines?

A. Yes, with just, as I stated before, material changes made in the adjustments of it, but the principle of the machine was still there, and always has been. For instance, the bars, the riveting bars, was changed; the scope of them was changed. That is all. But the original head and the machine—the principle of the machine was not changed any.

Q. 28. And you say whatever changes were made were made there by George Pardy to make it operative?

A. Yes.

Q. 29. And he had the machine operate in a satisfactory manner before he left? A. He did.

Q. 30. And how long was he at the works engaged in making the first machine work satisfactorily?

A. Oh, I should say he was on and off there different times a good part of six months, I should say; something

(Testimony of S. H. Gowen.)

in that neighborhood. I don't remember just exactly. He was there several times.

Q. 31. Were any changes made in that first machine by Mr. Stellow? A. No.

Q. 32. Were any changes made on any of the pipe riveting machines that were used by J. D. Hooker made by Mr. Stellow?

A. Not only just simply in the adjustments.

Q. 33. In the adjustments? A. That is all.

Q. 34. What do you mean by "in the adjustments"?

A. Why, the shifting bars were changed slightly, and it was made to reverse a little quicker or little slower. Just small material changing that would occur on any machine, you know.

Q. 35. Just such changes as are ordinarily found in adjusting a new machine?

A. Yes, That is all.

Q. 36. To do its work properly?

A. That is all.

Q. 37. But the principle of the machine—

A. Has never been changed.

Q. 38. Has never been changed? A. No, sir.

Mr. HARPHAM.—That is all.

Cross-examination.

(By Mr. McKINLEY.)

Q. 39. When you say that Pardy was there six months, Mr. Gowen, you mean it was six months between his first visit, and his last visit?

(Testimony of S. H. Gowen.)

A. Yes.

Q. 40. And he was there occasionally during that period?

A. Yes. He was there off and on.

Q. 41. You are not in the employ of the J. D. Hooker Company now? A. No, sir.

Q. 42. Haven't been since what time?

A. Not since 1903.

Mr. McKINLEY.—That is all.

Redirect Examination.

(By Mr. HARPHAM.)

Q. 43. You worked with that machine during all the time that it was in the J. D. Hooker Company's place?

A. Yes, sir; it was under my supervision during the time I was there. When I left it the machines were there, the three of them, in good condition and running in good order. That is, not all three running together, you know, but then first one and then another. Now, in that little machine—I don't know whether you want this as testimony or not.

Q. 44. Just state that.

A. After they got the second machine, which was manufactured in San Francisco and set down, I took the bar, that is, the stake, that goes into the bottom, and had that reduced down to make 4-inch pipe, and we used that altogether after that for 4-inch pipe, and only for 4-inch—4-inch or 5-inch. The second machine that came in there took the precedence of all of the work.

(Testimony of S. H. Gowen.)

Q. 45. And you say the second machine was like the first, was it, except stronger?

A. Yes, sir; the same thing, only larger.

It was stipulated by and between the counsel for the respective parties, that the reading, correcting and signing of the deposition by the witness are waived.

Mr. HARPHAM.—Complainants object to the taking of any testimony on behalf of the defendant, on the ground that the complainants have put in their rebuttal testimony and there is no provision of law entitling the defendant, to take testimony at this time, after the rebuttal testimony has been introduced by the complainants.

Mr. VAN COTT.—That is the only ground that you put it on?

Mr. HARPHAM.—I don't put it on the ground of any want of notice or anything of that kind.

Mr. VAN COTT.—Just on the ground that we have no right to any further testimony?

Mr. HARPHAM.—No.

J. D. HOOKER, recalled on behalf of the defendant, testified as follows:

Direct Examination.

(By Mr. VAN COTT.)

Q. 1. Now, Mr. Hooker, at the time of these various transactions with reference to this riveting machine,

(Testimony of J. D. Hooker.)

you had books and papers, I suppose, containing the records of your business? A. Yes, sir.

Q. 2. And where did you have those?

A. Well, I had them in my office at the works.

Q. 3. In the city of Los Angeles?

A. Yes, in the city of Los Angeles.

Q. 4. What has become of those books and papers?

Mr. HARPHAM.—I object, on the ground it is irrelevant and immaterial, and not rebuttal to anything that has been brought out by the complainants in their rebuttal testimony.

A. In 1895, my store was burned up, and in the office—the whole books and letters, and so forth, were outside of the office and were burned, and I have lost the book of—the ledger and communications and drafts and all the details of this work from which I might refresh my memory.

Q. 5. (By Mr. VAN COTT.) Have you made search for the various sketches of the machine, details of the machine, which you have already testified that you made?

A. I took the bookkeeper and went over in the vault that we have now that is there in the basement to see if we could find anything by which we could follow it up, but nothing can be found.

Q. 6. That search was made subsequent to the fire you speak of? A. Yes.

(Testimony of J. D. Hooker.)

Q. 7. And where, to the best of your recollection, did you keep memoranda of that sort?

A. Why did I keep that?

Mr. HARPHAM.—This goes in all subject to the same objection?

Judge McKINLEY.—Yes, sir.

A. Well, I had my letter-books and I had my ledgers and I had old letters, and I had no room in the safe to keep them and I necessarily had to put them in boxes and pack them away on the outside, and there is where that material was, and that was burned up.

Q. 8. (By Mr. VAN COTT.) Now, sir, I call your attention to a letter, being an exhibit introduced by the complainants, dated October 14th, 1887, written by you to Mr. George Pardy, in which you say, among other things, that you enclose your check or draft for $300. Will you state whether you did enclose such check or draft? A. Doubtless.

Q. 9. And for what purpose?

A. To pay the bills of constructing the work—the machine.

Q. 10. I ask you with reference to complainants' exhibit dated November 25, 1887, being a letter written by you to Mr. George Pardy, and in which you state that you enclose your check or draft for $200—for what purpose did you make that remittance?

A. To pay the necessary expense. To pay Pardy and to pay the construction on the machine.

(Testimony of J. D. Hooker.)

Q. 11. I call your attention to complainants' exhibit dated December 28, 1887, letter from you to George Pardy, in which you state that you enclose your check or draft for $500. For what purpose was that remittance made?

Mr. HARPHAM.—I object to that upon the same ground as the other objection, and also on the further ground that there is no ambiguity about the letter and it speaks for itself—does not need explanation.

A. For payment of construction of the machine.

Q. 12. (By Mr. VAN COTT.) I call your attention to complainants' exhibit dated July 24, 1889, being a letter written by you to George Pardy, in which you state that you enclose your check or draft for $22.50. For what purpose was that remittance made?

Mr. HARPHAM.—Same objection.

A. Well, it would look from the sum that it was to pay some particular bill. What that bill was, I can't remember.

Q. 13. (By Mr. VAN COTT.) I call your attention to complainants' exhibit dated July 24, 1889, being a letter from you to George Pardy, in which you state you enclose your check or draft for $100?

A. What is the date of that?

Q. 14. July 24th, 1889. For what purpose was that remittance made?

(Testimony of J. D. Hooker.)

Mr. HARPHAM.—Same objection.

A. If my memory serves me, he told me he wanted to go into the mountains and he hadn't the means, and would I help him; and my recollection is that I sent him that hundred dollars that he could go up to Alta, or up in the Tahoe region among the pines for his health. And I think he went up there and after he came back died. I never saw him alive after I wrote him that letter. No account was ever rendered to me.

Q. 15. (By Mr. VAN COTT.) Now, I call your attention to complainants' exhibit dated October 10, 1887, being a letter from you to Mr. Pardy, in which you say: "Your letter 8th received. Glad to hear you are sure you can make the machine. Go ahead with all possible dispatch. Do not lose any time," and so on, and so on. Can you recall how long prior to that, if at all, you had seen Mr. Pardy in reference to this machine?

A. What is the date of that?

Q. 16. October 10, 1887.

A. Well, that letter was written after Mr. Pardy—I had been up there and talked the matter over with Mr. Pardy and had brought him down to Los Angeles and we had gone over it and made sketches innumerable and I had shown him what we wanted to do and I had given him sketches, quite a number of which I had of my own, and he took them with him back, and I asked him to assemble these things together with the principles laid out; and his letter doubtless to me was to the

(Testimony of J. D. Hooker.)

effect that we could assemble that and make a machine, and if he could do it I wanted it done as quick as he could.

Q. 17. Do you know Mr. William Pardy?

A. I met Mr. William Pardy once for about two minutes.

Q. 18. Where was that, sir?

A. Well, my recollection, impression, is that it was in George Pardy's old office in the Haywood Building, on the third floor. And my meeting with him came about in this way. General Dickinson is a member of my wife's family by marriage and I used to make my headquarters in old Dickinson's office. Pardy was next door, and I had a great deal of communication with Pardy through that building, through that door. And I asked Dickinson, my recollection is, where they had buried Pardy. He said he didn't know, but his brother was there and could tell me; and I went to the office, where ever it was—it might have been across the street, or it might have been in the building. I judge from that that it was over in the Safe Deposit Building. I don't remember. I went and asked him, "George is dead now. Where did you lay him away?" And he told me. And I can't say where he said. I just stepped inside the door, and was not in the room two minutes. And the disposition of the body of George Pardy was the only thing that was brought up that I have any recollection of.

Q. 19. Well, will you state whether or not anything

(Testimony of J. D. Hooker.)

was said at that time about this riveting machine and George Pardy's connection with it?

A. None whatever.

Q. 20. Now, at any time had Mr. William Pardy, or anybody now using or connected with George Pardy's estate, made any demand upon you with reference to this machine? A. Never.

Q. 21. I mean prior to this conversation?

A. Oh, no. No, never saw them. Never saw William Pardy until that time. Never knew him.

Q. 22. You have stated, have you, all who were present on this occasion when you saw Mr. Pardy?

A. Just Mr. William Pardy. He stood with his back to me as I came in, he was writing at a desk, standing up; and he turned as I came in, and I said, "Is this Mr. Pardy's brother?" He turned around and we had a few words, and I went out.

Q. 23. Well, was a woman by the name of Albertine Hasler there at that time?

A. There in the office?

Q. 24. Yes.

A. No, not that I know of.

Q. 25. Well, had you seen her at any time prior to that with reference to this machine?

A. With reference to the machine?

Q. 26. Yes, sir. A. Never.

Q. 27. Or with reference to George Pardy's connection with the machine? A. No, never.

(Testimony of J. D. Hooker.)

Q. 28. Or any bills that had been rendered to George Pardy for the construction of the machine?

A. No, never. Shall I tell when I did see her?

Q. 29. Well, a little later, yes. A. Yes.

Q. 30. Now, we have here the deposition of William Pardy, who swears that he is the executor of the estate?

A. Who? William?

Q. 31. William Pardy, who swears he is executor of the estate. And, among other things, he says that he went through the papers of the estate of the deceased, and he identifies a check, which I now show you, marked Exhibit No. 3, I think it is, dated May 11, 1888. Did you ever see that check?

A. It has got my endorsement on it. I doubtless did, yes, sir.

Q. 32. Yes. Well, can you state what that check was for?

A. Well, it was to return some money to me of mine which Pardy held. In making the first machine there was a rebate allowed on the machine. The amount of it I don't remember, but it was over a hundred dollars. And it might have been that that was returned to me for that reason. Or, it might have been that I had a draft on San Francisco for $150, and he asked me for fifty, and I endorsed my check over to him and took his in return for the hundred dollars. In any event, it was my money.

Q. 33. Well, did you ever at any time borrow money from George Pardy? A. Never did. Never.

(Testimony of J. D. Hooker.)

Q. 34. You frequently went to San Francisco?

A. Yes, sir.

Q. 35. And did not carry a bank account there?

A. Not at this time. I do now.

Q. 36. Well, what facilities had you for borrowing money there?

Mr. HARPHAM.—Object to that as incompetent and immaterial, and not connected with any issue involved in the case.

A. Simply to make my draft, my check, on Los Angeles, and take it to the First National Bank, and they would cash it without a word.

Q. 37. (By Mr. VAN COTT.) You had been engaged in business in San Francisco previous to that?

A. Forty years. Oh, yes. Twenty-five years.

Q. 38. And had, as a matter of fact, cashed checks in that way before this?

Mr. HARPHAM.—Same objection.

A. Yes, sir. Never had occasion to borrow money. Never.

Mr. HARPHAM.—And on the further ground it is leading.

Mr. VAN COTT.—Well, that is probably true, if you want to lose the time over it. What is your answer?

Mr. HARPHAM.—He answered it.

Judge McKINLEY.—Better ask it again in proper form and get the answer.

(Testimony of J. D. Hooker.)

Q. 39. (By Mr. VAN COTT.) Well, now, to put it in another way, state what your practice was when you were in San Francisco with reference to obtaining money when you needed it?

Mr. HARPHAM.—Object to that, on the ground it is irrelevant and immaterial, and not in rebuttal of anything that has been brought out by the complainants.

A. My habit was, to save exchange, to get a draft from the First National Bank here on the First National in San Francisco. I saved exchange by it. If I wanted more money, if I found up there I needed up there to use it, I simply went to the First National Bank there and made my draft, which they cashed, and gave me the money. That is before I opened a bank account after coming down here. For years I had carried my bank account with them; done a large business.

Q. 40. (By Mr. VAN COTT.) By "they" you mean the First National Bank of San Francisco?

A. The First National Bank of San Francisco, of which Mr. Murphy is the president.

Q. 41. Now, Mr. William Pardy states in his deposition that according to his recollection a conversation took place some time in September, following his brother's death, in 1889, with Pardy, as executor "and in his endeavor to settle with Mr. Hooker the question of Mr. Hooker's relations with my brother, George Pardy came up." Will you state whether or not, in that month, or at any time subsequent to the death of

(Testimony of J. D. Hooker.)

George Pardy you had such a conversation with Mr. William Pardy, and, if so, what?

A. Never had any conversation of that character at all.

Q. 42. Now, you have stated that prior to the time when you say you did have a short interview with William Pardy, no claim had been made by either William Pardy or either of these claimants or anybody connected with the estate, that money was owing to George Pardy's estate on account of this machine.

Mr. HARPHAM.—Object to that, on the ground that it is leading and not in rebuttal.

Mr. VAN COTT.—I have not asked the question yet. I am only stating what he has already sworn to.

Q. 42. (Continued.) Now, I ask you whether any such claims were ever made at or about the time mentioned in this deposition?

Mr. HARPHAM.—Objected to as leading, and not in rebuttal.

A. No claim ever made, no demand ever made upon me by them; never.

Q. 43. (By Mr. VAN COTT.) He further states: "In the controversy arising I stated to Mr. Hooker that there was two ways of settlement with the estate; either to pay a fair and proper compensation to it for the riveting machine spoken of, or to allow the estate to take out a

(Testimony of J. D. Hooker.)

patent upon it." Did he ever make any such statement to you? A. Never.

Q. 4. He further answers, in response to the question: "What reply did Mr. Hooker make in relation to the statement that you have just detailed, if any? A. He replied, 'You can take out the patent.'" Did you ever make any such statement to him?

A. Well, I am not insane. I don't think I should give a man a verbal order to go ahead and do business for me, not knowing him, being a stranger. I never gave him any such order.

Q. 45. Did you ever make any such answer to him?

A. Never.

Q. 46. Now, the question is asked of him: "Where was Mr. Hooker at this time?" The answer is, "In room 19 of the Safe Deposit Building, corner of California and Montgomery street, San Francisco." Is that the same building to which you have alluded?

A. No, that is across the street. My recollection was it was in George Pardy's office next to General Dickinson; but there is a possibility that the office was across there and I went to it on seeing notice on the door they had moved. But I am not clear on it. My impression is it was the old office.

Q. 47. In the course of his deposition, a sketch was shown to Mr. William Pardy which he identifies as having found among the papers of the estate. The sketch is marked "Complainants' Exhibit 5"—what are those initials? "F.L.O."? "F.L.O., N.P."

(Testimony of J. D. Hooker.)

A. What does that "F.L.O." mean?

Q. 48. That means the initials of the notary public, to identify it as the exhibit given on that day.

A. Oh.

Q. 49. Did you ever see that sketch before?

A. I don't recall it.

Q. 50. No.

A. It is a sketch that carries the car wheel, but it is not the sketch from which the machine was made. You see that this sketch is made throwing down the rivet sets as if the rear car wheel was coming along there.

Q. 51. Well, now, let me ask you right here, doesn't it show two operations, the first operation by the big wheel and the second operation by the little wheel following and completing the crushing?

A. It shows an erroneous idea, which could not be carried out. The wheel that throws down the rivets was made in the center right under that, and that wheel sets down the rivets. These wheels do not set down the rivets that he has got made there at all. That is his first idea. That is the one we worked upon. The rivets had to be put into a slot and was down straight. And he was running, you see there, a regular carriage of a car, and he is trying to set that rivet down with a car wheel. This is to carry the balance of the carriage up here by which you could shim it down. But the wheel that sets down the rivets is located right in there, and is to to-day.

(Testimony of J. D. Hooker.)

Mr. HARPHAM.—Pointing to the center of the sketch between the wheels.

The WITNESS.—That is nothing.

Q. 52. (By Mr. VAN COTT.) Now, is or is not that sketch similar, in a general way, to many others that were made during the time that Pardy was here with you?

Mr. HARPHAM.—Objected to, upon the ground it is leading.

A. Very similar. He made various sketches, carried out various ideas. Some we threw out and some we adopted, and finally assembled the machine, carrying down the rivet set upon the rivet as shown here, but the method of setting the rivet set down is not shown there. That don't amount to anything.

Q. 53. (By Mr. VAN COTT.) Now, in what material respect does that sketch differ from the one which you have testified to as having been originally furnished to George Pardy by you, if any?

Mr. HARPHAM.—Objected to, on the ground that it is irrelevant and immaterial, and not in rebuttal of anything brought out by the complainants.

A. Now, you ask me that question, "In what respect"?

Q. 54. (By Mr. VAN COTT.) Read the question to the witness again. (Question 53 read to the witness by the Special Examiner.)

(Testimony of J. D. Hooker.)

A. Well, we made so many sketches that I can't tell what the other were, nor wherein it would differ.

Q. 55. Well.

A. This is a very imperfect thing, just a scratch.

Q. 56. Let me recall your memory, Mr. Hooker, to the fact that you testified that you had conceived the idea of crushing the rivet sets by the use of car wheels.

A. Yes.

Q. 57. That car wheel to be on a carriage confined to its work by an overhead beam?

A. That is it. Yes, sir—

Q. 58. And that you made a sketch and gave it to Mr. George Pardy embodying, in general, those ideas. Do you recollect your testimony to that effect?

A. Yes, yes.

Q. 59. Well. Now, how does that differ from that sketch?

Mr. HARPHAM.—Objected to as leading and not rebuttal.

A. Well, in the main it is the same thing, excepting the wheel that sets the rivets.

Q. 60. (By Mr. VAN COTT.) Well, that is what I want.

A. The bar is here, the overhead beam is here, the carriage is here; but the wheel that sets the rivets does not appear on it.

Q. 61. Now, did you ever meet a woman in San Francisco by the name of Albertine Hasler?

(Testimony of J. D. Hooker.)

A. Yes, if that is the person with whom George Pardy was associated. I don't know her first name.

Q. 62. Well, we have the deposition of Albertine Hasler. A. I knew a Miss Hasler.

Q. 63. In which she testifies that she is the Miss Hasler complainant in this action. A. M-h'm.

Q. 64. And states that she met you at a certain time in San Francisco. She says: "When he came to see Mr. Pardy I was assorting papers belonging to the estate, and Mr. Hooker came in at that time."She then says that she was present at the time Mr. William Pardy and Mr. Hooker had a conference in the Safe Deposit Building. Then the question is asked: "What was said by Mr. Pardy? What was said by Mr. Hooker, as near as you can recollect and what was said at that conversation relating to this pipe-riveting machine matter?" and she answers: "Mr. Pardy said to Mr. Hooker that there were two ways of settling this. One was for Mr. Hooker to pay to the estate of George Pardy a certain amount for his labor, invention, and so forth, and the other was that we would take out a patent, and Mr. Hooker replied 'Get the patent." Did you see Miss Hasler in company with Mr. Pardy on that or any occasion?

A. I did not.

Q. 65. Was any such question ever put to you by Pardy in Miss Hasler's presence?

A. There was not.

Q. 66. Did you ever state to George Pardy, in the presence of Miss Hasler—

(Testimony of J. D. Hooker.)

Mr. HARPHAM.—You mean William Pardy, not George Pardy.

Q. 67. (By Mr. VAN COTT.) I beg pardon. William Pardy, in the presence of Miss Hasler, the words which she here states?

A. Positively no. I did not.

Q. 68. Now, she further testifies with reference to the check, exhibit 3—she is asked: "When did you see that check? A. When I had a conversation myself with Mr. Hooker. I showed him this check and I showed him some of the bills that Mr. Pardy had paid for the construction of the first machine."

A. First machine?

Q. 69. Did you ever have such a conversation with her? A. Never.

Q. 70. Did she ever show you that check?

A. Never saw the check from the day I cashed it to the present day.

Q. 71. Did she ever show you bills that George Pardy had paid for the construction of the first machine?

A. Never. I don't do business with women.

Q. 72. She is further asked: "Did you have any conversation with Mr. Hooker yourself in relation to this statement of bills paid by Mr. Pardy on Mr. Hooker's account in relation to this check for a hundred dollars? A. I showed him the bills that had been paid by Mr. Pardy, and I showed him that check, and Mr. Hooker said he didn't know anything about the bills. He

(Testimony of J. D. Hooker.)

didn't say anything about the check." Did she ever have such conversation? A. Never.

Q. 73. Or make any such statement to you?

A. Not to my knowledge.

Q. 74. Or show any such bills to you?

A. Not to my knowledge.

Q. 75. And being further examined about the check, she is asked in whose handwriting the pencil memorandum "Borrowed money" on the back of the check is, and she says; "I dare say it is Mr. William Pardy's. I don't know who wrote it. I didn't notice that. Q. Now, you said that you know that Mr. George Pardy loaned Mr. Hooker this money. How do you know? A. Well, Mr. Hooker used to come to the city, Mr. Pardy always was here and he told me of it; and he said that time that Mr. Hooker was short, 'and I loaned him a hundred dollars.'" Did you ever have any conversation with George Pardy about your being short? A. Never.

Q. 76. Or did you ever borrow from him this specific sum of a hundred dollars?

A. Never borrowed from him the sum of ten cents. Never had occasion to.

Q. 77. Well, did Miss Hasler ever say to you that George Pardy had told her you had borrowed a hundred dollars from *her*. A. Never.

Q. Did you ever have any conversation with Miss Hasler as to how much you had paid George Pardy?

A. Never.

(Testimony of J. D. Hooker.)

Q. 79. She states, in answer to the question as to any other conversation she has had with Mr. Hooker about this matter, "Well, he told me that he paid $150 to Mr. Pardy for his services; but I knew he had not, and so I shook my head." Did you ever tell her you had paid him $150.

A. Never. I had no occasion to. I don't do busines that way.

Q. 80. Did you ever meet a young man by the name of William S. Pardy, a nephew of George Pardy?

A. Not to my recollection.

Q. 81. We have the deposition of William S. Pardy, who swears that he is George Pardy's nephew.

A. Nephew of William S. Pardy?

Q. 82. Nephew of George Pardy, a son of William Pardy.

A. I never knew he had a nephew. Nephew of George Pardy, son of William Pardy?

Mr. HARPHAM.—Yes.

The WITNESS.—No, I never knew him, never knew he had a son.

Q. 83. (By Mr. VAN COTT.) In his deposition, William S. Pardy swear that he has previously seen the sketch marked "Complainants' Exhibit 5," and he states in answer to the question when he saw it and where: "Yes, I have seen this sketch before, at the office of my uncle, George Pardy, which was at 402 Montgomery street, in the latter part of the year 1887. Q. Please

(Testimony of J. D. Hooker.)

state the circumstances under which you saw that sketch." He then testifies: "I called at his office and he introduced me to Mr. Hooker, with whom he was conversing at the time, and they talked for quite a while, and after they got through their conversation my uncle George sat down and made this sketch during the afternoon. Q. What Mr. Hooker was there? A. Mr. J. D. Hooker of Los Angeles. Mr. Hooker was telling my uncle that he would like to get a riveting machine that would rivet pipe, and that if he could get up such a machine, he could make some money out of it." Did you ever have any such conversation with William Pardy in the presence of William S. Pardy?

Mr. HARPHAM.—You mean George Pardy, in the presence of William S. Pardy?

Mr. VAN COTT.—I beg your pardon. I got it confused. Thank you.

A. Never in my sane moments. Never had anything of the kind. It is all a myth.

Mr. VAN COTT.—I will ask the Special Examiner to repeat the question and ask Mr. Hooker for an answer yes or no.

(Question 83 repeated by the special examiner.)

A. No, sir.

Q. 84. He continues: "Well, my uncle at that time referred to a pipe riveting-machine that was at the Richmond Iron Works, and Mr. Hooker said that it

(Testimony of J. D. Hooker.)

wouldn't suit his purposes. He said he had seen it, that he knew of that machine." Was anything of that sort—

A. No, sir.

Q. 85. —ever said between you and George Pardy in the presence of William S. Pardy?

A. Never. I was not accustomed to discuss my business in the presence of strangers.

Q. 86. Well, later in his deposition in his cross-examination, he fixes the date of this conversation as probably in October. Did you have any such conversation with George Pardy in the presence of William S. Pardy in October? A. No, sir.

Q. 87. 1887? A. No, sir.

Q. 88. Do you remember a man by the name of S. H. Gowan? A. Yes.

Q. 89. Who was he?

A. Foreman in my works, pipe works.

Q. 90. You say he is dead?

A. No, no. Sam Gowan is still living. Stellow is dead.

Q. 91. Yes, I remember Stellow is dead.

A. Sam Gowan was the Superintendent, and he is the man that had the strike and led the men out of my works, and was an enemy to the machine.

Q. 92. You say he was an enemy to the machine?

A. He was an enemy to the machine.

Q. 93. And he is not now with you?

A. No, sir.

(Testimony of J. D. Hooker.)

Q. 94. Well, what are his relations towards you when he left there?

A. Amicable, I guess. I never allowed him to handle the machine, and he never did one turn with it. "Amicable"—if leading a strike was amicable. He went out, led a strike.

Q. 95. Was he discharged at the time that he struck?

A. Yes, sir.

Q. 96. And he never returned?

A. No, sir.

Q. 97. Well, that is what I mean. What, if anything, did he have to do with the installment of this machine?

A. He didn't have anything to do with the installment of the machine?

Q. 98. What, if anything, did he have to do with the experiments with this machine?

A. He didn't have anything to do with the experiments of the machine. The most he could have had to do with it was putting the wheels on the shaft to carry the belt over to the machine.

Q. 99. What, if anything, did he have to do with the installment of or experiments with the first two machines? A. Nothing.

Q. 100. Nothing?

A. No. What he had to do was to cut the pipe to its diameter, have it punched and rolled and furnished to the machine. Then it was taken up by people—workmen—over whom he had not the control, run

(Testimony of J. D. Hooker.)

through the machine, riveted, and then sent back to the straight seamers. He had nothing to do with the management or handling of the riveting machine. I dared not trust him.

Q. 101. Now, he is asked, in question 43, on his re-direct examination: "You worked with that machine during all the time that it was in the J. D. Hooker Company's place?

A. Yes, sir. It was under my supervision during the time I was there. When I left the machines were there, the three of them, in good condition and good running order." Is that true, that he worked with that machine during all the time that it was in your place?

A. It is not. The machines were in good running order, not through his care.

Mr. VAN COTT.—That is all.

Cross-examination.

(By Mr. HARPHAM.)

Q. 102. Who did have charge of these machines, if Mr. Gowan did not? A. The men that ran them.

Q. 103. Who were they?

A. Well, I can't call the names now. Stellow was one. Well, there were four or five of them. I can't recall the names.

Q. 104. Look at this sketch which you have testified about, marked, "Complainants' Exhibit 5." What does this little round ring about in the center of the sketch

(Testimony of J. D. Hooker.)

and midway and a little above the two wheels of the carriage show? A. Shows a bearing

Q. 105. Shows a bearing? A. Yes, sir.

Q. 106. Well, now, just look around—Don't you see the outline of a wheel of which that is the central bearing coming in just inside of those two outer wheels that run over the rivets?

A. I see that wheel now. I didn't see it before.

Q. 107. Does not that show that that is to bear on these central rivets to depress them and set them?

A. There is an indication that that is down and that is coming down.

Q. 108. Yes, sir.

A. I was looking at this one here. This carries it below.

Q. 109. And that is done by that central wheel there, isn't it?

A. Yes, done by that central wheel.

Mr. HARPHAM.—That is all.

The WITNESS.—Yes, sir. There is the sketch of it in there.

Redirect Examination.

(By Mr. VAN COTT.)

Q. 110. Well, now, still looking at the sketch, it is a fact, is it not, that one of these small wheels is shown at a position further from the overhead beam than the others and that the car is tilted?

(Testimony of J. D. Hooker.)

A. I don't get your idea.

Q. 111. Now, here; just look at the right-hand small wheel. A. Yes.

Q. 112. That apparently rests on the heads of the crushed rivets, doesn't it? A. Yes, sir.

Q. 113. And the other rests apparently at the surface of the bar? A. Yes.

Q. 114. The rivet set bar? A. Yes, sir.

Q. 115. And the line of the frame of the carriage—A. Yes.

Q. 116. —is at an angle— A. Yes.

Q. 117. —with the top surface of the rivet set bar? A. Correct.

Q. 118. Showing the car at an angle?

A. Yes, showing the hind wheel set down to the rivet. You can see where it has depressed the rivets there.

Q. 119. Now, let me ask you, is there any such feature as that in the present machine? A. No, sir.

Q. 120. Was there any such feature as that—

Mr. HARPHAM.—One moment. I object to that, on the ground that it is not rebuttal, and is irrelevant and immaterial.

Mr. VAN COTT.—Why, it is immediately in connection with the question that you have asked him.

Mr. HARPHAM.—I have not asked him anything about the carriage, except that central wheel.

(Testimony of J. D. Hooker.)

Q. 121. (By Mr. VAN COTT.) Was there any such feature as that in the sketches, which you originally made for Mr. Pardy's use? I mean with that arrangement of rear small wheels and front small wheels and frame of the carriage at an angle with the top surface of the rivet set bar?

Mr. HARPHAM.—Same objection.

A. There was not.

Mr. VAN COTT.—That is all.

Mr. HARPHAM.—That is all.

Judge McKINLEY.—That closes our testimony.

It was stipulated by and between the counsel for the respective parties that the reading, correcting and signing of the deposition by the witness are waived.

[Endorsed]: Filed Sep. 30, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

Complainants' Exhibit No. 1—L. L.

(No Model.) 2 Sheets—Sheet 1.

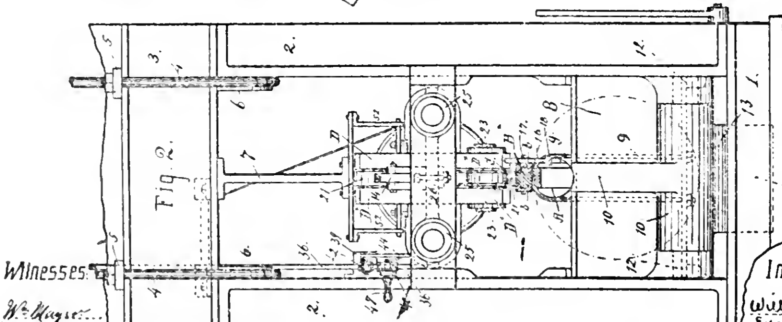
G. PARDY, Dec'd.

W. PARDY, Executor.

RIVETING MACHINE.

No. 434,677. Patented Aug. 19, 1890

Fig. 1.



(No Model.) 2 Sheets—Sheet 2.

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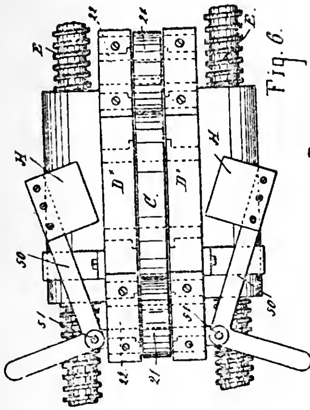

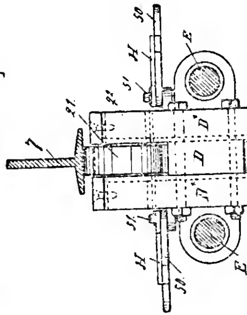

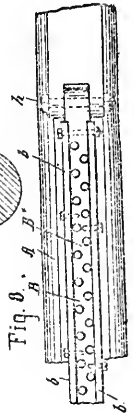

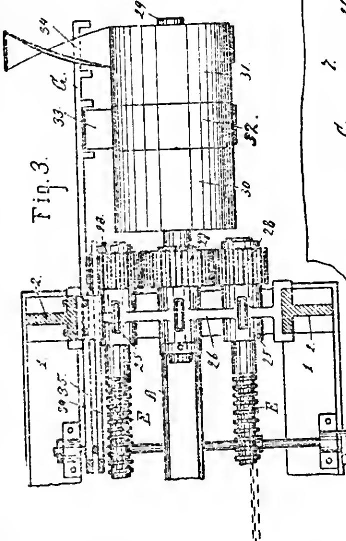

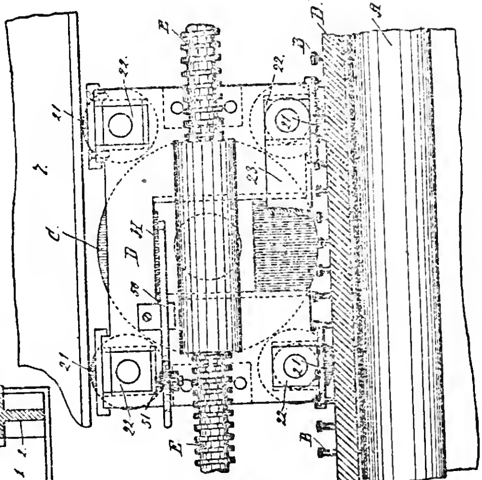

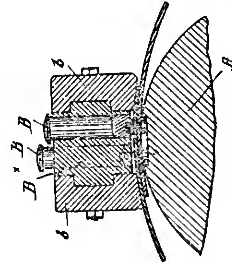

Witnesses:
Wm. Wagner
A. B. Charlot

Inventor.
William Pardy
Exr. of Estate Geo. Pardy decd.
By Smith & Osborn Atty's.

UNITED STATES PATENT OFFICE.

ILLIAM PARDY OF SAN FRANCISCO, CALIFORNIA, EXECUTOR OF GEORGE PARDY, DECEASED.

RIVETING-MACHINE.

SPECIFICATION forming part of Letters Patent No. 434,677, dated August 19, 1890.

Application filed December 16, 1889. Serial No. 334,008. (No model.)

To all whom it may concern:

Be it known that GEORGE PARDY, late a citizen of the United States, residing in the city and county of San Francisco, State of California, did invent certain new and useful Improvements in Riveting-Machines, of which the following is a specification.

This invention relates to riveting-machines for all kinds of tubular work, such as sheet-metal cylinders, small boilers, and tanks, metal tubes, and piping; and it consists in certain construction and combination of stationary mandrel or support for the work, a gang of rivet-sets, and a traveling riveting-tool operating to crush and head the rivets by pressure, as hereinafter fully described, producing a machine for setting and fixing a line or lines of rivets along a seam or joint of considerable length at one operation.

The accompanying drawings, forming a part of this specification, represent an improved riveting-machine constructed according to the present invention for the special work of fixing two rows of rivets along the seams of sheet-metal piping.

Figure 1 is a side elevation, and Fig. 2 is an end view, of the machine, looking toward the left-hand side of Fig. 1. Figs. 3 to 8, inclusive, represent the principal parts and mechanisms in detail on a larger scale. Fig. 3 is a top view of the reversing-gear that operates the traveling riveting-tool. Figs. 4, 5, and 6, show the riveting-tool in side view, end view, and top view. Fig. 7 is a vertical cross-section through the stationary mandrel or work-support and the rivet-sets and holding-bar, and Fig. 8 shows the same parts in top view.

The principal parts of this machine consist of the stationary mandrel A, on which the piece of work is supported, a gang of rivet-sets B, Fig. 4, corresponding in number and arrangement to the rivets along the seam or joint of the work, and a pressure wheel or roller C, mounted in a traveling carrier D, having movement between the guide-rails over the line of work and pressing upon the heads of the rivet-sets with sufficient force to crush down and head the rivets upon which the rivet-sets act. The riveting-roller at each complete operation is moved twice over the gang of the rivet-sets, first in one direction to crush down the rivets and then back over the line again to head up and finish the end, and in connection with the roller or its carrier there is provided means to maintain suitable pressure of the roller upon the rivet-sets during such return movement. Automatic reversing-gear controls the movement of the carriage D and changes the direction of travel at the end.

The parts of the machine-frame consist of the bed 1, Fig. 1, the posts or uprights 2 2, and the cross-beams 3 3. The posts are bolted down to the bed in two rows, leaving suitable space between the rows to take in the work to be riveted, and the overhead beams joining the tops of each opposite post are fastened by stirrup-bolts 4 4 and strap-washers 5 5. Each bolt takes a half-round lug 6, cast on the inner side of the post, and the washers straddle the beam. A deep center beam 7, Fig. 2, with the top and bottom flanges, is fixed against and supported by these cross-beams longitudinally through the center space in the frame. Two other cross-beams 8 8, below the deep center beam, are fixed between the two pairs of posts at the rear end of the frame. All beams are what are called "deck-beams." The mandrel or work-support A rests at one end on the cross-beams 8 8, and is secured to them by stirrup-bolts 9 9; but the front or opposite end is supported by a swinging prop-bar 10, that is arranged to be swung back out of the way when introducing and removing the piece of work. This prop is hinged at 12, and the fact of the mandrel where the prop bears against such cut-away part is cut away on a curve corresponding to the curve described by the end of the prop. The counter-balance 13 below the center of movement brings the prop into upright position when released after being, turned down.

B×, the set bar or part that holds and places the rivet-sets B B B, is a bar or plate having a number of holes for the rivet-sets and finished flat on the top, but concave on the bot-

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tom. The sets B are made of hardened steel with a slight increase in diameter at the top, giving sufficient taper to prevent them from dropping through the holder when that part is raised, and each set has a concave point corresponding to the shape of the rivet-head it is intended to form. The set-bar is pivoted at *h*, Figs. 1 and 8, and is raised and lowered on this point of attachment in setting and removing the piece of work, and the bottom face of the bar is curved in cross-section to agree with the average curvature of the cylinder or piece to be riveted.

In a machine constructed for work of comparatively small diameters—say piping or tubing from six to twenty-four inches in diameter—the curvature for a fifteen-inch pipe could be taken, while for large work the bottom of the bar could be practically flat.

Steel side strips *b b*, bolted or welded on the bar B×, stand above the face of the bar to take the pressure of the carriage wheels or rollers. The front end of the set-bar is suspended from the end of the weighted lever 14 by link 15, Fig. 1, the weight being adjustable on the lever to slightly overbalance and tend to raise the bar. Against the action of this weight the latch 16 holds down the end of the bar. This latch is a hook pivoted at 17 to the set-bar and projecting a short distance above the bar at the upper end, while the hook takes under a pin 18 on the side of the mandrel. A friction-plate 19, between the hook and the flattened side of the mandrel, holds the hook at any point when thrown back clear of the pin. The function of this latch is to prevent the front end of the set-bar from tipping up when the riveting-tool is pressing down on the opposite end beyond the point where the set-bar rests on the piece of work before the roller has come fairly over the seam at that end of the pipe. A tapering pin 19, projecting from the bottom of the set-bar, takes in a hole in the mandrel beneath and accurately centers the rivet-sets over the rivets in the work. In setting the piece of work it is fixed and held by a tapering pin 20 on the bottom of the set-bar, so placed that it shall take into the last hole in the line of rivet-holes from which the last rivet is omitted until the next joint of pipe is joined to it and the round seam is riveted up. At such time of operation, also, the opposite end of the joint is held in place with proper lap by slipping a ferrule or short sleeve over the shank of the last rivet in the line at that end, and this sleeve standing above the rivet centers the hole in line with it in the set-bar, and by pushing out that rivet-set draws the overlapping ends of the pipe into line. This ferrule is picked out of the hole in the set-bar before the riveting-tool reaches that point in the line of seam, and the displaced rivet-set is returned to place. The ferrule has a slight taper, in order to enter the hole easily.

The carriage of the riveting-wheel is formed of the two slabs D× D×, fixed at suitable distance apart to give room in the center for the small carrying-wheels 21 21 and the riveting-wheel C, or the frame of the carriage may be cast in one piece. Openings at the top and bottom are provided for axle-boxes 22 of the top and bottom carrying-wheels, and also an opening in the center of each side for the boxes of the wheel C. As these center openings tend to weaken the carriage, the strengthening-bars 23 23 are fixed across the carriage over the axle-boxes, as seen in Figs. 1 and 2. On the sides of this carriage are brass screw-nuts or boxes for the screw-shafts E E, that move the carriage. In this movement the upper sets of wheels travel against the bottom flange of the deep center beam, and the lower wheels run on the raised side strips *b* on the rivet-set bar, which forms a track or rail for that purpose.

Journal-boxes 25 25 on the cross-bars 26 26 at each end of the machine support the screw-shafts, and motion is given to both shafts by the spur-gears 27 28 28, Fig. 3.

The driver 27 is fast on the counter-shaft 29, on which are two loose pulleys 30 31, separated by a third pulley 32, fast on the shaft. One of these loose pulleys carries a straight belt 33 and the other a cross-belt 34 from a main-line shaft, and from either one of these belts the shaft 29 is driven by shifting the belt from its carrying-pulley to the driving-pulley 32.

In connection with the belt-shifter G and automatic shifting mechanism is arranged to change the direction of motion by or from the movements of the carriage. This mechanism consists of the long slide-bar 35, connecting at the outer end with the belt-shifter and extending along at one side of the frame, the lever 36, pivoted at 37 on the top of the center beam, the lower end of which lever sets against the side of the bar 35, while the end above the pivot is overweighted by the weight 38. A second slide-bar 39, above and parallel with the bar 35, is moved by the carriage and acts upon the lever 36 to throw it over the center, by means of which the principal slide-bar is moved and the belt-shifter worked. The lever 36 plays between the two sets of rollers 40 41 42 43 on the slide-bars 35 39. (Seen in Fig. 1 in dotted lines, because they are behind the carriage, and in end view, Fig. 2.) Two stops 44 45, depending from the upper bar in the path of the carriage—one in front and the other behind it—move a bar 39 when struck by the carriage, and as the roller of the bar which is behind the lever moves the lever over beyond the center the weighted upper end at such time acts to throw out the lower end with force against that roller on the lower slide-bar which is in front of the lever. Thus the upper slide-bar moves the weighted lever, and that part in turn operates

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to throw the shifting lever through the medium of the lower slide-bar. The stops are so adjusted that the motion of the screw-shaft is arrested and the carriage stopped, or it is reversed and the carriage moved back to the starting-point at the end of the travel. The chain 46 holds the lever from throwing over too far. A handle 47 is provided on the front end of the slide-bar 35 for working the belt-shifter by hand.

In the operation of riveting the crushing and heading is partly done in the forward travel of the carriage and is afterward finished by the return movement, and consequently the riveting-roller requires to be set more closely down to the work in the backward travel. This is accomplished by the use of shims or plates H H, inserted between the tops of the journal-boxes of the riveting-roller and the frame of the carriage at the proper time. These prevent the riveting-wheel from rising as high as before and set it down closely against the partly-presssd-down rivet-sets.

The shims are set in and drawn out mechanically by the following-described means: The horizontally-swinging levers 50 50, pivoted at 51 51, Fig. 6, to lugs on the outer side of the carriage, have the shims H fixed on the end nearest the frame in position to enter the side openings over the journal-boxes, and their other ends are bent outward from the pivots to set in the path of depending stops 52 53, Fig. 1, that are fixed to the under side of the center beam, one in front of the other behind the carriage. The stops are properly set to throw in the shims when the riveting-wheel drops down after passing over the last of the rivet-sets in front, previous to the return movement of the carriage, and they are drawn out immediately after the wheel returns over the first set in the rear. The bar 55 on the top of the mandrel, in line with the rivet-set bar, forms a track for the carriage after it leaves the end of the set-bar. This bar has about the same height and width as the set-bar.

In the operation of this machine the cylindrical work is tacked together by a rivet at each end to hold the piece in shape and the rivets are stuck in all along the seam, filling every hole but one at the end. The piece is then placed on the mandrel with seams and rivets properly centered, and the rivet-set bar is lowered and fastened down at the front end by the latch. The carriage is started forward by throwing the proper belt upon the driving-pulley, and by traveling over the gang of rivet-sets first forward and then back again to the starting-point the whole number of rivets along the seam are crushed down and headed.

Having thus fully described his invention, what he claims, and desires to secure by Letters Patent, is—

1. The combination of a stationary mandrel or work-support, a gang of rivet-sets mounted in a holding-bar, which is laid over the line of rivets with a rivet-set directly upon each rivet, and a traveling pressure wheel or roller having movement along the rivet-set bar and adapted to act upon the heads of the rivet-sets with suitable pressure, as hereinbefore described.

2. In a riveting-machine, a stationary mandrel or work-support, a rivet-set bar having a gang of rivet-sets loosely mounted therein and adapted to be raised from the mandrel for inserting the piece of work and to be brought down and secured in place over the seam or joint to hold a rivet-set directly upon each rivet of the work, a traveling pressure-roller mounted in a carriage to travel along the set-bar over the heads of the rivet-sets, an overhead rail arranged above said set-bar and adapted to hold the carriage down to its work with suitable pressure, and mechanism for moving said carriage over the work between the set-bar and the overhead rail.

3. In a riveting-machine, the combination, with the stationary mandrel, of the gang of rivet-sets, the traveling carriage, pressure wheel or roller, overhead rail, screw-shafts, driving-gear, reversely-driven pulleys, driving-pulley, and belt-shifting mechanism adapted to be operated on by the carriage to control and reverse the movements thereof, as described.

4. In a riveting-machine, the stationary mandrel supported permanently at one end and at the opposite end by a swinging support arranged to be thrown clear of the mandrel to insert and remove tubular work, in combination with the removable rivet-sets mounted therein and the centering-pins in the set-bar adapted to take through the work and into the mandrel beneath.

5. The combination of the stationary mandrel or work-support, rivet-set bar, loosely-mounted rivet-sets, traveling carriage, one head-rail, pressure wheel or roller having axle-boxes movable in recesses in said carriage, and the shims or plates adapted to take in said recesses over the axle-boxes. substantially as and for the purpose described.

6. In a riveting-machine, a traveling carriage having a pressure wheel or roller mounted therein, a gang of rivet-sets mounted in a holding-bar, a stationary mandrel adapted to support the work under the rivet-sets, mechanism for moving said pressure-roller carriage back and forth along over the rivet-set bar, and means for setting down the pressure-roller against the heads of the rivet-sets in the return or backward movement of the carriage.

7. In combination with the stationary mandrel or work-support, the rivet-set bar hinged at one end, the supporting-lever to which the opposite end is attached, and the latch ar-

iged to hold down that end, substantially described.

3. In a riveting-machine, a gang of rivet-s mounted in a holding-bar by which they placed and held in position on a line or es of rivets to be crushed down and headed, combination with a stationary work-sup-rt and a traveling riveting-tool adapted to ve over said holding-bar with suitable pressure against the heads of the rivet-sets, 10 substantially as described.

WILLIAM PARDY,
Executor of the estate of George Pardy, deceased.

Witnesses:
EDWARD E. OSBORN,
A. M. CHARLOT.

[Endorsed]: Complts. Ex. No. 1. L. L. No. 1125. U. S. Cir. Ct. So. Dist. of Cal. Wm. Pardy et al. vs. J. D. Hooker Co. Complainants' Exhibit 1. Leo Longley, Special Examiner. Filed Sep. 30, 1905. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy.

Complainants' Exhibit No. 2—L. L.

In the Superior Court, in the City and County of San Francisco, State of California.

Department No. 9—Probate.

In the Matter of the Estate of
GEORGE PARDY,
Deceased.

Decree of Settlement of Accounts and Final Distribution.

William Pardy, Executor, of the Estate of George Pardy deceased, having on the 17th day of February, A. D. 1890, rendered and filed herein a full account and report of h— administration of said estate, which account was for a final settlement, and having with said account filed a petition for the final distribution of the estate.

And said account and petition this day coming on regularly to be heard, proof having been made to the satisfaction of the Court that the clerk had given notice of the settlement of said account and the hearing of said petition, in the manner and for the time heretofore ordered and directed by the Court.

And it appearing that said account is in all respects true and correct, and that it is supported by proper vouchers; that the residue of money in the hands of the executor at the time of filing said account was $1,035.-65; that since the rendition of said account ——— has been received by the ———; that the sum of $———

has been expended by h— as necessary expenses of administration, the vouchers thereof, together with a statement of such disbursements, are now presented and filed, and said statement is now settled and allowed and the payments are approved by this Court; that the estimated expenses of closing the estate will amount to $20.00 leaving a residue of $1,035.65.

And it appearing that all claims and debts against said decedent, all taxes on said estate, and all debts, expenses and charges of administration have been fully paid and discharged, and that said estate is ready for distribution, and in condition to be closed.

That said George Pardy died testate leaving him surviving, John Pardy and William Pardy, brothers of said deceased, and Miss Albertine Hasler, all of whom are legatees under the will of said decedent.

It is further ordered, adjudged and decreed, that the said final accounts of the executor be and the same are settled, allowed and approved, and that the residue of said estate hereinafter particularly described, and any other property not now known or discovered, which may belong to the said estate, or in which the said estate may have any interest, be, and the same is hereby distributed as follows:

The sum of $759.00 cash, be distributed to said William Pardy, John Pardy and Miss Albertine Hasler, one-third to each. That is to say, to each of said parties be distributed the sum of $253.00. That the sum of $759.00, aforesaid, being the amount received on the sale of the U. S. Bonds aforesaid. And that the sum

of $276.65 be, and the same is hereby distributed as follows: One-half of said sum, to wit, $138.32, to the said William Pardy, one-eighth of said sum, to wit, the sum of $34.58 to the said John Pardy; and to the said Albertine Hasler three-eighths of said sum, to wit, the sum of $103.74. All other property of said estate, be and the same is hereby distributed, in the proportion to each of said parties as last aforesaid. One-half to said William Pardy, and one-eighth to said John Pardy, and three-eighths to said Albertine Hasler.

The following is a particular description of the said residue of said estate, referred to in this decree, and of which distribution is now ordered as aforesaid. Letters patent of the Government of the United States, issued September 15th, 1885, No. 326,145, for a compressed air motor; and letters patent issued by the Government of Great Britain, in 1884, No. 14,635, for said compressed air motor. There is hereby distributed an undivided one-half interest in both said letters patent to said William Pardy; to said John Pardy, an undivided one-eighth interest therein; to said Albertine Hasler an undivided three-eighths interest therein.

Done in open court this 26th day of February, 1890.

WALTER H. LEVY,
Judge of the Superior Court.

[Endorsed]: Filed in open court Feby. 26, 1890. Wm. A. Davies, Clerk. By H. E. Hall, Deputy Clerk.

F. No. 127. Hayden Printing Co.

Office of the County Clerk of the City and County of San Francisco.

I, John J. Grief, County Clerk of the City and County of San Francisco, and ex-officio clerk of the Superior Court thereof, do hereby certify the foregoing to be a full, true and correct copy of the Decree of Settlement of Accounts and Final Distribution in the matter of the estate of George Pardy, deceased, now on file and of record in my office.

Witness my hand and the seal of said Court, this 13th day of May, A. D. 1904.

[Seal]

JOHN J. GRIEF,
Clerk.

By E. S. Hawley,
Deputy Clerk.

(Endorsed.)

Complainants' Exhibit No. 4—L. L.

Eureka, Nevada, May 2nd, 1903.

In consideration of one dollar $1.00 to me paid by William Pardy of the city and county of San Francisco, State of California, I do hereby sell and assign to the said William Pardy all my right, title and interest in and to the Letters Patent of the United States No. 434677. Patented to William Pardy, Executor, dated August 19th, 1890, for a Pipe Riveting Machine together

with all rights of action which have accrued to me by reason of the infringement of said letters patent.

Witness my hand this 2nd day of May, 1903.

JOHN PARDY.

Witness:

I. C. C. WHITMORE.

(Endorsed.)

Complainants' Exhibit No. 5—L. L.

Los Angeles, Cal., Oct. 10, 1887.

Dear Pardy,

Your letter 8th received. Glad to hear you are sure you can make the machine. Go ahead with all possible dispatch. don't lose any time. My men are all in a stew to-day—have postponed their strike for one week.

I want the trial made of this machine with dispatch & am ready to pay the bill whether or not the venture will work. If you should fail in this maybe in another you would not. I know you will do your best and under any circumstances I shall feel you have done your best. Send any good men you can get.

Am glad Mr. Vogel endorses you, Mrs. Hooker would wish to be kindly remembered if she knew I was writing.

Faithfully,

J. D. HOOKER.

(Endorsed.)

Complainants' Exhibit No. 6—L. L.

Los Angeles, Cal., Oct. 14, 1887.

George Pardy, 402 Mty. St., San Francisco.

Dear Pardy:

Herewith please find C. K. to your order for 300.XX the strip of Iron with holes will go by express tonight to Robbins. Dont let Robbins into your confidence he is after this very thing. You are quite right in your suspicion as to the matter of Sam's leaking. he will work against everything to take place of men. Hence it will hardly do to trust anything whatever to him. He will make the machine a failure of he can depend upon that—we wont let him however. The Jardine punch has been made to exactly conform to the Robbins punch—so only one strip will be sent. Doyle has not shown up.

Yours truly,

HOOKER.

The Jardine punch will punch 42 in plate. Robins only 36 in but both alike in space the number of holes in Jardin is 62 & in Robbins 54.

(Endorsed:)

Complainants' Exhibit No. 7—L. L.

Los Angeles, Cal., Oct. 20, 1887.

Dr Pardy

Can you give me any Idea as to power of engine I will need with these machines. will want to run (4) four of

them lathe &c beside my other machinery. Give me what information you can. Yours &c

J. D. HOOKER

(In pencil.) Evidence that H knew little if anything of the machine.

(Endorsed.)

Complainants' Exhibit No. 8—L. L.

Los Angeles, Cal., Oct. 22, 1887.

Dear Pardy

To yours 20th. It seems to me you should take into consideration making 8 10 & 12 inch Pipe first with this machine. I can't see how you can make large pipe on a small anvil or stake. Wont we want large machine & small machine for inst 4 in pipe takes 5 lb Rivet and 8 10 & 12 takes 10-rivet the power to crush which will be greater. Better consider the turning up of the pipe on the anvil with rivets in Will send Robbins the distance wanted if I can get at what he wants—4 in Pipe dia double Riveted will be 3⅞ Sam says though cant tell until we can make a joint which we will do as soon as we can change punches—machine is very busy now Most of the work to be done will be on 30 inch Iron—Not 36 in Cant use 36 in larger than 16 in because round seamers can't get at it to put in rivets. Will send forward pipe to rivet as soon as we can get to it which will be Monday I think.

Push her and perfect her but be careful of every point as you go.

Faithfully

(Endorsed.) J D H

Complainants' Exhibit No. 9—L. L.

Los Angeles, Cal., Oct. 24, 1887.

Dr Pardy

Better not send any more men. We are full now & beside the machine will soon be done which we hope will drop out quite a number.

Robbins was just in here. Says he is on his way east to perfect a riveting machine. Is bound to build a machine that will rivet by hammering—Your going to him has aroused him to get up a machine of his own. Says he is bound to make something of the kind that will do the business.

Speed of our shaft is 140—Who in thunder is Wm. Hammond Hall? he has some good sense would like his letter. Am busy as can be

Rpy

J D H

Robbins got his dimension O. K.

(Endorsed.)

Complainants' Exhibit No. 10—L. L.

Los Angeles, Cal., Oct. 26, 1887.

Dr Pardy

Yours 22d You are right about 10 ib Rivet being largest and 4 in pipe being smallest we make Sam says double row 4 in will be $3\frac{7}{8}$ will ship pipe forthwith. You can buy 5 & 10 lb Rivets there of Montague & Co or Dunham & Co. We want good round seamers two left yes-

terday for the north—will send strips if can get Sam to cut them today.

Hope your efforts will be as successful as you hope. Robbins says he goes East to see one of the best men in the known world in regard to making riveting—Told him did not want him to take up our ideas—say "well patent it then."

Yours

J. D. HOOKER

(Endorsed.)

Complainants' Exhibit No. 11—L. L.

Los Angeles, Cal., Oct. 29, 1887.

Dear Pardy

We wired you yesterday to see what could be done in getting a pair of shears—The big punch & shear machine combined from J. B. Jardine broke down through the middle I have made a partial payment to him—will have to throw the machine back upon him and have written through his brother Lew to see if he can furnish a pair of shears to off set the payment made, if he cannot will have to get a pair from Robbins.

I have a new building ready for your machine with shafting &c ready to go in place as soon as you will require. Sam got hurt at a fire hence delay in sending pipe samples. Will get them off soon. Hot down here now.

Yours

J D HOOKER.

(Endorsed.)

Complainants' Exhibit No. 12—L. L.

Los Angeles, Cal., Nov. 25, 1887.

Geo. G. Pardy, 402 Montgomery st., San Francisco.

Dear Pardy

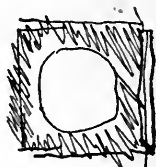
Here you have her $200—as you reques. Rah! Rah! Rah! for the machine if she works.

Faithfully

J D HOOKER.

Having lots strips made will take 5 to 8 lb rivets.

(Endorsed.)



Complainants' Exhibit No. 13—L. L.

Los Angeles, Cal., Dec. 23, 1887.

Dear Pardy

To yours of the 20th I will send you 500—Early next week—The delay and expense is O.K. if the machine will

prove a success. It has always seemed to me that the motion to crush the rivets should be like the movement of the die machine at the mint you know how nicely that has to work but you doubtless have investigated that movement.

The rivet heads inside the pipe must come up snug—they will gather any amount of stuff if they stick up too much.

I am short this week or would hand you the money by this mail.

Yours truly

J D HOOKER.

(Endorsed.)

Complainants' Exhibit No. 14—L. L.

Los Angeles, Cal., Dec. 28th, 1887.

Geo. Pardy, Esq., 402 Mty. St., San Francisco, Cal.

Dear Pardy

Herewith please find Draft to your order for 500. as per your request. I hope you will get the thing to perfection before you send it. You suit will be long passed Jany 1s before we get the thing running I have the boiler and engin to your place as soon as I can get men to place it.

Yours truly,

J. D. HOOKER.

(Endorsed.)

Complainants' Exhibit No. 15—L. L.

Los Angeles, Cal., Jan. 5th, 188—.

do everything you think should be done then send her forward—we will put it to a working test in short order. The engine & boiler we have as I before wrote you—will lose no time in getting them in place

Put all the finishing touches upon the Riverter Make its fine appearance taking—that is something to the workmen you know. Do everything you think should be done & then send her forward. but in doing this don't delay too long. I cannot possible go up Am too busy. Will send you all the pipe you want. The expense cuts no figure on the first machine—plan a little for a single riveter, with holes $\frac{7}{8}$ from centers—I think we must have one or two of this size to set a 5″ rivet in 4-5 & 6 in pipe light iron say #18 & 16.

I am determined to give these machines a good trial build a second one as soon as you feel yourself justified in doing so.

Very truly with a Merry Christmas,

JNO D HOOKER.

My wife joins in the Merry Christmas.

(Endorsed.)

Complainants' Exhibit No. 16—L. L.

Los Angeles, Cal., Jany. 19, 1888.

Dear Pardy

Yours 17th received. Better push another riveter ahead at once with a rush I want it P. D. Q. The one you shipped has not arrived. No advices of it. Will not keep you any longer than necessary. Are you to send Pete to run it and set it up. If you have Robbins build these tie him up in some way that he will not build for any one else—The Lacy crowd will be after him at once. The tester should take Pipe from 4 to 30 inches dia and longer (20) twenty feet shortest 2½ feet.

Rush the second machine ahead and Shears want them very quick.

You.

J. D. HOOKER.

(Endorsed.)

Complainants' Exhibit No. 17—L. L.

Los Angeles, Cal., Feb. 1, 1888.

Dear Pardy

I find my new Engine will run the main shaft 140 Rev. will this effect your Riveter so as to impare its use if so will have to put in a counter shaft please advise by wire.

Yours truly,

J. D. HOOKER,

(Endorsed.)

Complainants' Exhibit No. 18—L. L.

Los Angeles, Cal., Feby. 17, 1888.

Dear Pardy

I have yours of the 9th. Well may be I get shook up once in a while. There is going to be lots of work in the future but these hounds go in and knock all the profit there is in a job out of it. However I think they will tire of it by and by. I dont propose any one shall have those machines if I can help it I have the frame and shafting up for the new one and will have work for it to do as soon as in place. There are some big schemes ahead & with these machines we can win There is one big one which if it goes through will make you some money for you will have to aid me in it if I get it. I wrote you about going to the mountains. Will you leave the schoolmarm for a time and that dusty city it will benefit you sure.

Again as to the machines I understand I am to own and control the patent upon them paying you a fair and reasonable sum for all your time and labor, and what will be just and fair between us. I grant you ten times the patience I have—that is what I lack hence I need just such an element with me when things are moving.

I hope the machine & punch will show better work than has ever been done in making pipe. I learn the Risdon has a million & 1/4 contract with the Spring Valley for pipe to supply Oakland and Alameda.

You must arrange for pulleys. My shaft is 2 in The machine will set just as the first one is placed.

Faithfully

J. D. HOOKER.

(Endorsed.)

Complainants' Exhibit No. 19—L. L.

3/19/88

Dear Pardy

11/ My men are all on the rampage down here. Everything is off but the Riveter. George is running her at the rate of 25 Joint per hour today—the work is O. K. Sam says George uses so much oil one joint will slip through the other. The men have written "Non Union" over the riveter they hate it I tell you. Now they are off they will stay so until the come back satisfied to behave. I am in no hurry to have them come. Can take their time. How long before you can have a machine to rivet #12 or 14 Iron will have a lot to make right away.

Faithfully

J. D. HOOKER.

(Endorsed.)

Complainants' Exhibit No. 20 —L. L.

Los Angeles, Cal., Mch. 16, 1888.

Geo. Pardy Esq.,

Dear Pardy: To yours of the 13. 1st The main crushing wheel seem to be O. K. in every particular so far as I can see. No indentations.

2d. All four small wheels are O. K.

3d. Gear Wheel work much easier and smoother since you were here seem O. K.

5. Side plates on main bar wear down with outer edge turning over just a little. George has made two new ones but they are too high so machine does not set rivet down as it should. Has gone back to the old ones which he has finished down. the work is finest yet turned out—it is almost perfect would be if punches worked without breaking.

6. Have sent you sets broken all of them—

7th. Under side of top beam does not show wear.

8. Steel pc on mandril is as you left it.

9. Cant say where you can improve except in holding down bar at end where George props it with stick of wood.

10. You must make many more sets this seem to be a weak point—bad sets show bad work at once.

11. Shipping rig seems to act O. K. Have seen George set machine moving then turn to setting rivets paying no attention to machine until it stopped itself.

12. One new set busted today. Hope they will work better.

What progress have you made with new machine. I have about 65,000 feet of #12 & 13 (B. G.) pipe from 6 to 12 inch which I wish to make on machine. Will want it as soon as you can turn it out.

Faithfully

JNO D. HOOKER.

(Endorsed.)

Complaintants' Exhibit No. 21—L. L.

Los Angeles, Cal., Mch. 24, 1888.

Dear Pardy

All our men are on the rampage except the yard men, it is both on a/c of wages and machine. I am running machine on 6-in. pipe. Sam tried his best to make a bad job of it finds fault with it & is an intense enemy. the machine does well and when we get one or rather two or three more going it will make a bulwark they cannot over throw—times are dull and grow worse and worse. Money awful tight. Shall I have pinion gear made before a brake—seems to me you had better have pattern made there and sent here—it costs so much here. I have a man to take Georges place if he gets knocked out—Sorry you think you got malaria here. How much did you get any way? Am glad Robbins takes an interest hope he will produce a bang up pc of work.

Maybe I had better follow your instructions as to the gear here. Only Llewelyn charges like a house afire.

Sam is going to buck us Monday morning—we will let him out I think—Dont care to do much any way now.

Faithfully,

JNO. D. H.

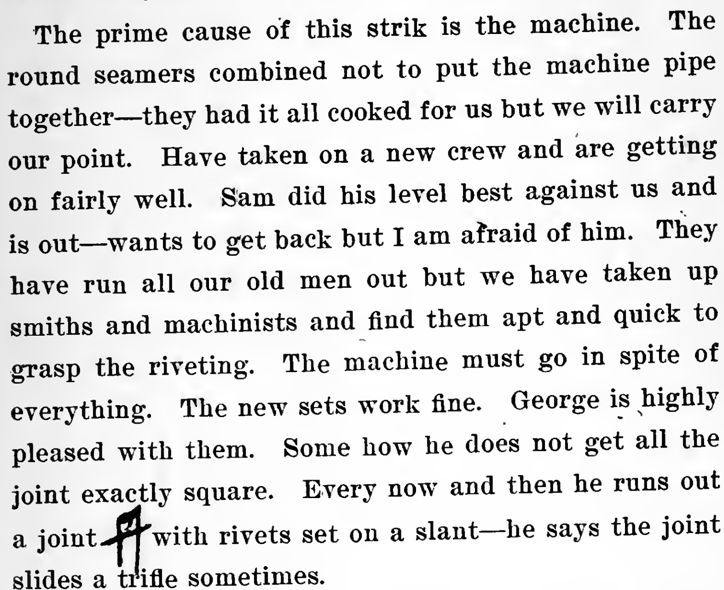
These fellow are in full blast on my coating.

(Endorsed.)

Complainants' Exhibit No. 22—L. L.

Los Angeles, Cal., Mch. 29, 1888.

Dear Pardy.



The prime cause of this strik is the machine. The round seamers combined not to put the machine pipe together—they had it all cooked for us but we will carry our point. Have taken on a new crew and are getting on fairly well. Sam did his level best against us and is out—wants to get back but I am afraid of him. They have run all our old men out but we have taken up smiths and machinists and find them apt and quick to grasp the riveting. The machine must go in spite of everything. The new sets work fine. George is highly pleased with them. Some how he does not get all the joint exactly square. Every now and then he runs out a joint with rivets set on a slant—he says the joint slides a trifle sometimes.

Will send you a sketch of Hydrant tomorrow. Push the machine ahead as rapidly as possible will want it before you can get it out.

Simonds telegraphed to you about a man named Redding who is a first class fitting maker hope you found him or some one who does know him. This machine is going to take the lead in this business.

Yours faithfully,

J. D. HOOKER.

(Endorsed.)

Complainants' Exhibit No. 23—L. L.

Los Angeles, Cal., Apl. 10, 1888.

Dear Pardy

When may we expect a new Riveter we have work depending upon it and want to get at it with the least possible delay Kindly advise me at once what the prospects are.

Faithfully,

J. D. HOOKER.

Have you been and you ill?
long time since we heard from you.
(Endorsed.)

Complainants' Exhibit No. 24—L. L.

Los Angeles, Cal., Apl. 11th, 1888.

Dear Pardy.

To your of the 9th. If things are dull up there there can be no use in opening up in the pipe business now. It will be safe to do it within a year from now maybe. Montague has a factory on Beal St and is working 5 of our round seamers Trade down here has fallen off. somewhat yet I think the outlook good for a years business.

About the pump I left it entirely with you to purchase what you pleased You know better than I do we must have the machine completed right away.

George is doing good work with this riveter though he breaks too many sets by crushing it down too hard

I have him now where he will do well I am sure. Hope to see you soon

Faithfully,

HOOKER.

(Endorsed.)

Complainants' Exhibit No. 25—L. L.

Los Angeles, Cal., April 30, 1888.

Dear Pardy

Yes, we want more sets. Geo says the blue ones are best. he has written you some of the old ones are yet in use. There are no new defects that I know of. the machine is doing the best work it ever did. Geo is turning out 230 joints per day—I have kept after him until now he is doing careful and good work—he has been very careless and did not get all the riveting true, claiming the rivets were uneven but it was all his fault from lack of care. We are running on #14 iron and the work is fine—24 in will do for the 2d machine with 3 feet lengths—Am anxiously waiting to hear from that patent business—have not hear a word since we sent it on. I should be glad to pay so you could push this machine ahead.—I will want another Robbins punch if I could get any satisfaction out of him—he is a very unsatisfactory man to get work through.

Wish I could do something to help you keep up with the procession you have Mrs. Hooker's sympathy I can assure you. Faithfully,

J. D. HOOKER.

(Endorsed.)

Complainants' Exhibit No. 26—L. L.

Los Angeles, Cal., July 20th, 1888.

Dear Pardy

Send machine dont keep it for me I may not go to S. F. but to Tahoe direct—beside I have a machinist here ready to put it in place.

There are some large jobs to be let along the Sierras. I dont want to sell these machines can make more out of the work I want to own the whole business paying you fairly & squarely what would be right beside if we get these contracts there will be a chance for you to make more money this way than in mfrg machines Could I control the coating & machines it would be worth thousands every year—Montague is trying to get a machine for this Lacy outfit here I would not be very nice to have my enemy at once have all the things I have studdied and wrought up—it is bad enough to have them cut me out with this coating to give them a machine would ruin my business entirely. I would quit before I would follow it—They bid to cost for work hoping to bust me out and agree to do all I will do—by putting in "testing pipe" I got the Riverside work at 10% above their bid—Their object is ruin—I am in doubt whether or not would not be money in my pocket to move away at once.

Faithfully,

JNO D. H.

(Endorsed.)

Complainants' Exhibit No. 27—L. L.

Los Angeles, Cal., May 6, 1889.

Dear Pardy

Your letter of the 2d is at hand—Herewith please find Dft for 22.50 as you request I am very glad to know you will get the Pipe Coating patent. I would like the patent as soon as it can be had because I am getting up a catalogue & would like to embody it in the book When I was in the city you were sick and I was very busy beside I came away unexpectedly,—were you a well man I should be inclined to be—as Tates says—"Cross" with you for the last few letters you have written me—but a sick man is not to blame for being irritable & out of temper. I propose to do the square thing with you—I do not think you ever knew me to do otherwise. I shall be in S. F. shortly when I will see you—You have not paid out any of your money for me. I will make it plain to you

Rfy

HOOKER.

Not a shop here is turning a wheel—no business & little prospect.

(Endorsed.)

Complainants' Exhibit No. 28—L. L.

Los Angeles, July 23/89.

Dear Pardy

We secured an order for 1½ miles of pipe & I had concluded to run it through the bull if I could get a wheel —Booth shrunk a steel band band upon a broken roller but it broke plumb through. The little bull is useless —see letter herewith. this 2000 feet was made on the little machine & will have to come up as useless I fear. The man who did the work claims now that the indentations in the wheel did not permit the set to be forced down uniformly hence the leaking of all the straight seam.—I want to give the big machine one more trial with a perfect wheel and new support steel strip—The wheel Robbins sent down we returned to him It did not stand up for a single day.—The first wheel on the little machine did the best work. Am sorry you cant get this wheel made right away—while you are at it had you not better get two made for one may burst up with a day or two's run where as another might stand up to the work. There is a large amount of money in these machines. I would like to utilize the plant if possible.

Robbins sent me some side bars—of no earthly value. they are as soft as cast iron. Cut like putty. I distinctly told Robbins himself to make them the very best that could be—certainly like the first—but he did not do it.

Rfy

HOOKER.

(Endorsed.)

Complainants' Exhibit No. 29—L. L.

Los Angeles, Cal., July 24, 1889.

Dear Pardy

I have your favor of the 22d Am sorry to learn of your ill health. Herewith please find $100—You may need it before I go up—I wrote you yesterday at length. One has to have more patience than I have to wait on Robbins—There is no use for him to do anything unless first class and then he fails I hand you his letter for your inspection Kindly return it to me. Looking for good news from you as regards health I am

Faithfully,

J. D. HOOKER.

(Endorsed.)

United States Circuit Court, Ninth Circuit, Southern District of California, Southern Division.

WILLIAM PARDY and A. HASLER,
Complainants,
vs.
J. D. HOOKER COMPANY (a Corporation),
Defendant.

Assignment of Errors.

Now come the complainants, William Pardy and A. Hassler, and file the following assignment of errors, upon which they will rely upon their appeal to the Circuit Court of Appeals of the Ninth Circuit.

I.

The Court erred in holding and deciding that George Pardy was not the original and first inventor of the improvements in riveting machines described in the letters patent sued on herein.

II.

The Court erred in holding and deciding that the letters patent sued on in this action were void.

III.

The Court erred in dismissing complainants' bill of complaint.

IV.

The Court erred in not giving judgment for the complainants as prayed for in their bill of complaint.

HAZARD & HARPHAM,
Solicitors for Complainants.

G. E. HARPHAM,
Counsel for Complainants.

[Endorsed]: No. 1125. United States Circuit Court, Ninth Circuit, Southern District of Calif., Southern Division. William Pardy and A. Hassler, Complainants, vs. J. D. Hooker Company (a Corporation), Defendant. Assignment of Errors. Filed Mar. 5, 1906. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Hazard & Harpham, Solicitors for Complainant.

[Endorsed]: No. 1322. United States Circuit Court of Appeals for the Ninth Circuit. William Pardy and Albertine Hasler, Appellants, vs. J. D. Hooker Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States Circuit Court for the Southern District of California.

Filed April 2, 1906.

F. D. MONCKTON,
Clerk.

No. 1322.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM PARDY, and
A. HASSLER,
Appellants,
vs.
J. D. HOOKER COMPANY,
a corporation,
Appellee.

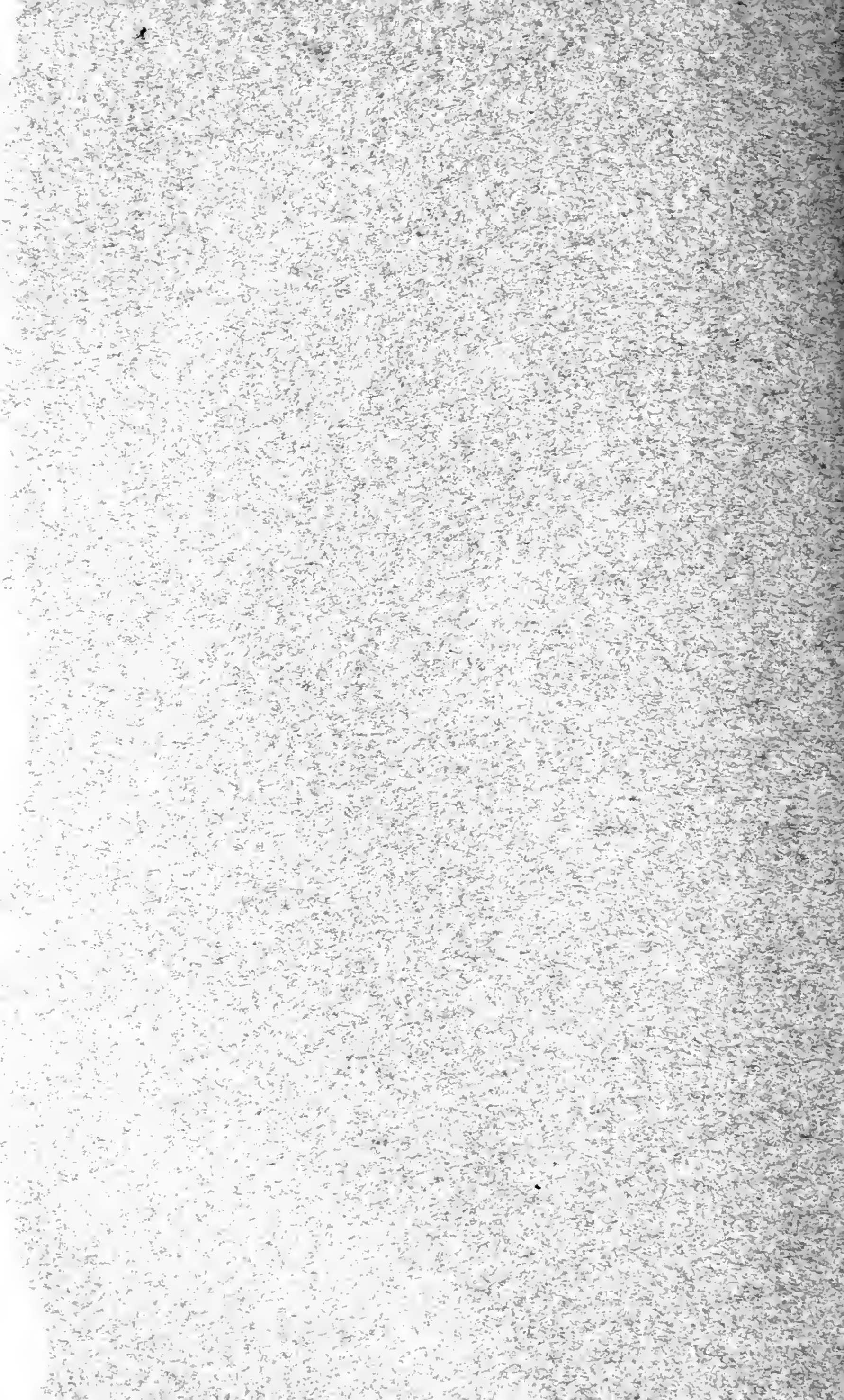
FILED
MAY -7 1906
F. D. MONCKTON,
CLERK

Appellants' Opening Brief.

G. E. HARPHAM,
Solictitor for Appellants.

HAZARD & HARPHAM,
of Counsel.

Pioneer Law Publishing Co., 129 Temple St., Los Angeles



United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 1322.

WILLIAM PARDY, and A. HASSLER, Appellants, vs. J. D. HOOKER COMPANY, a corporation, Appellee.	}

APPELLANTS' OPENING BRIEF.

This action was brought in the U. S. Circuit Court for the Southern District of California by the Appellants against the Appellee, to obtain an injunction against the use by the defendant of a machine which is an infringement of U. S. Letters Patent, No. 434,677, dated Aug. 19, 1890, for a Pipe Riveting Machine, and for an accounting. This patent was issued to William Pardy as executor of the last will of George Pardy, deceased.

The answer sets up the defense that George Pardy was not the inventor of the pipe riveting machine set forth in said Letters Patent, but that J. D. Hooker was the inventor of said machine, and that William Pardy acting as the executor of George Pardy, sought surreptitiously to appropriate the invention described in the Letters Patent, and falsely alleged that George Pardy was the inventor of said machine when he made the application for Letters Patent, and thereafter surreptitiously and unjustly obtained the patent sued on for that which was in fact invented by J. D. Hooker.

In the year 1887 J. D. Hooker, the President of the defendant corporation, was engaged in the business of manufacturing riveted steel pipe at Los Angeles, California, and George Pardy was a mechanical engineer and solicitor of Patents at San Francisco, California.

At that time there were no machines for riveting steel pipe when the rivets used were set cold. Hooker was having trouble with his men, and desired to have a machine which would rivet pipe. He consulted and employed George Pardy to build a machine for him at San Francisco, Hooker paying the bills for the construction of the machine. George Pardy designed the machine and superintended its construction and installation at Hooker's pipe works at Los Angeles. The first pipe riveting machine was set up at Hooker's works in Los Angeles in the early part of the year 1888. George Pardy came down from San Francisco and installed the machine, and worked over it until it worked all right.

A second machine was constructed at San Francisco by George Pardy in the early part of 1888, and was also installed in Hooker's pipe works the same year. George Pardy died in August, 1889, leaving a last will, which was duly probated at San Francisco. William Pardy as executor of that will, filed an application for Letters Patent on December 16, 1889, and the Letters Patent sued on were issued on that application on August 19, 1890. After the letters patent were issued, J. D. Hooker employed the Fulton Engine Works at Los Angeles, California, in the year 1893 to build a third machine like the first two machines, except that it was for making larger size pipe. Subsequently, J. D. Hooker transferred his steel pipe works, together with these pipe riveting machines, to the defendant corporation and at the time this suit was brought the defendant corporation was using all three of those machines in its business. The defendant was incorporated Feb. 13, 1895. The complainants, through probate proceedings in the estate of George Pardy and by mesne conveyances have succeeded to the title of the Letters Patent sued on. It is to enjoin the further use of the third and last machine and for an accounting of the profits made by its use that this suit is brought. The only question involved in this action is, was George Pardy or was J. D. Hooker the inventor of the machine described in the letters patent sued on in this action.

The ordinary rule of law which concedes to the prevailing party obtaining a verdict in the Court below the

presumption that he is right on all disputed points or facts, and the Appellate Court will not inquire into these is not the rule when an attempt is made to impeach the validity of a patent. It cannot be done by a conflict of testimony. The verdict in the Court below may be binding on all other points in which there is a substantial conflict in the testimony, but this rule will not obtain when an attempt is made to impeach a patent. It can only be done on such a preponderance of testimony as establishes beyond a doubt that the patent was surreptitiously obtained. On this point we desire to call the attention of the Court to the rule of law established hereon.

In the Barbed Wire Fence cases, the Court says:

> "We have now to deal with certain unpatented devices, claimed to be complete anticipations of this patent, the existence and use of which are proven only by oral testimony. In view of the unsatisfactory character of such testimony, arising from the forgetfulness of witnesses, their liability to mistakes, their proneness to recollect things as the party calling them would have them recollect them, aside from the temptation to actual perjury, courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof shall be clear, satisfactory, and beyond a reasonable doubt. Witnesses whose memories are prodded by the eagerness of interested parties to elicit testimony favorable to themselves are not usually to be depended upon for accurate information. The very fact, which courts as well as the public have not failed to recognize, that almost every important patent, from the Cotton Gin of Whitney to the one under consideration, has

been attacked by the testimony of witnesses who imagined they had made similar discoveries long before the patentee had claimed to have invented his device, has tended to throw a certain amount of discredit upon all that class of evidence, and to demand that it shall be subjected to the closest scrutiny. Indeed, the frequency with which testimony is tortured, or fabricated outright, to build up the defense of a prior use of the thing patented, goes far to justify the popular impression that the inventor may be treated as the lawful prey of the infringer."

Barbed Wire Patents, 143 U. S. 275; Book 36, L. C. P. 158.

In Deering *v.* Winona Harvester case, the Court says:

"As we have had occasion to observe, oral testimony, unsupported by patents or exhibits, tending to show prior use of a device regularly patented is, in the nature of the case, open to a grave suspicion. Washburn & M. Mfg. Co. *v.* Beat 'Em All Barbed Wire Co. ('The Barbed Wire Patent' 301), 143 U. S. 275 (36; 154). Granting the witnesses to be of the highest character, and never so conscientious in their desire to tell only the truth, the possibility of their being mistaken as to the exact device used, which, though bearing a general resemblance to the one patented, may differ from it in the very particular which makes it patentable, are such as to render oral testimony peculiarly untrustworthy; particularly so if the testimony be taken after the lapse of years from the time the alleged anticipating device was used. If there be added to this a personal bias, or an incentive to color the testimony in the interest of the party calling the witness, to say nothing of downright perjury, its value is, of course, still more impaired.

This case is an apt illustration of the wisdom of the rule requiring such anticipations to be proven by evidence so cogent as to leave no reasonable doubt in the mind of the court, that the transaction occurred substantially as stated."

Deering *v.* Winona Harvester Works, 155 U. S. 300; 39 L. C. P. 159.

It was incumbent upon the defendant to establish the defense that J. D. Hooker was the inventor of the machine described in the Letters Patent. In the celebrated Bell Telephone case, the Court says:

"The complainant starts with the benefit of the presumption of law that Bell, the patentee, was the inventor of that for which the Letters Patent were granted him. Whoever alleges the contrary must assume the burden of proof. Evidence of doubtful probative force will not overthrow the presumption of novelty and originality arising from the grant of letters patent for an invention. It has been frequently held that the defense of want of novelty or originality must be made out by proofs so clear and satisfactory as to remove all reasonable doubt. Washburn *v.* Gould, 3 Story, 227; Smith *v.* Fay, 6 Fish., 446; Hawes *v.* Antisdel, 2 B. & A., 10; Patterson *v.* Duffy, 20 Fed. Rep., 641; Wood *v.* Cleveland Rolling Mill Co., 4 Fish 560; Parham *v.* American Button Hole Co., do., 482."

In the United States Stamping Co. *v.* Jarrett (Blatch, 469) Blatchford, J., said the defendant had not fulfilled "the necessary obligation of showing beyond any reasonable doubt" that Weber (the alleged prior inventor) was prior to Heath (the patentee).

In Coffin *v.* Ogden (18 Wall, 129), Mr. Justice Swayne, delivering the opinion of the court, stated the rule applicable to the defendant as follows:

> "The burden of proof rests upon him, and every reasonable doubt should be resolved against him."

> American Bell Telephone Co. *v.* The Peoples Tel. Co. et al., 22 Fed. Rep., p. 309-13.

In Coffin *v.* Ogden, *supra,* the Court went further than stated in the above citation, and stated as follows:

> "The invention or discovery relied upon as a defense, must have been complete, and capable of producing the result sought to be accomplished; and this must be shown by the defendant. The burden of proof rests upon him, and every reasonable doubt should be resolved against him. If the thing were embryotic or inchoate; if it rested in speculation or experiment; if the process pursued for its development had failed to reach the point of consummation, it cannot avail to defeat a patent founded upon a discovery or invention which was completed; while in the other case there was only progress, however near that progress may have approximated to the end in view. The law requires, not conjecture, but certainty. If the question relate to a machine, as thus exhibited, the conception must have been clothed in substantial forms, which demonstrate at once its practical efficacy and utility. Reed *v.* Cutter, 1 Story, 500."

> Coffin *v.* Ogden, 18 Wall, 129; 21 L. C. P. 821.

The rule of law both on the burden of proof and as to what constitutes invention, is very clearly set forth

in Lalance & Grosjean Mfg. Co. *v.* Haberman Mfg. Co., 53 Fed. Rep. 375, as follows:

"He who first produces a device is entitled to be considered the inventor thereof, unless it be shown that another person was first to conceive of the invention, and was using due diligence in completing it, or suggested to the one who first produced the device all its parts, so that in producing it he was simply carrying out the suggestions of another. On this subject Mr. Justice Clifford said:

"The settled rule of law is that whoever first perfects a machine is entitled to the patent, and is the real inventor, although others may have previously had the idea and made some experiments toward putting it in practice. He is the inventor and entitled to the patent who first brought the machine to perfection and made it capable of useful operation. Agawan Co. *v.* Jordan, 7 Wall., 583.

"Mere suggestions, even if they pointed toward a result are not sufficient to entitle one making them to be considered the inventor. In order that he may claim the benefit of what another does his suggestions must leave nothing for the mechanic to do but to work out what has been suggested. On this point Judge Nelson, in instructing the jury in the case of Pitts *v.* Hall (2 Blatch., 229), said:

"Now, there is no doubt that a person, to be entitled to the character of an invention within the meaning of the act of Congress, must himself have conceived the idea embodied in his improvement. It must be the product of his own mind and genius, and not of another's.

"Is the patent anticipated by the Vollrath process?

"In considering this question, it is well to keep in mind the rule upon this subject. He who alleges

> prior use must establish it by the same high class of testimony which a prosecuting attorney is required to produce in a criminal case. He holds the affirmative of that issue, and must prove it beyond a reasonable doubt. If the evidence is susceptible of two interpretations, the one sustaining and the other destroying the patent, the court must accept the former."

The question of priority of invention is one that is frequently arising in the United States Patent Office, and is perhaps the most fruitful source of controversies arising in that office. We quote from the decision of Stevens *v.* Putnam, reported in the 18th Official Gazette, page 520, and at page 164 of the Commissioner's Decisions for the year 1880, in which the Hon. Marble, Commissioner, says:

> "The earliest date at which an invention can be said to exist is that time when there was in the mind of the inventor a well-defined idea of something which might rightfully constitute the subject of a patent. The law is well settled that a mere unembodied principle or discovery is not a subject of a patent, and it must logically follow that the mere mental apprehension of the same is not the conception of an invention. When, however, the principle or discovery is rendered of practical service by its embodiment in material form, there exists something for which a patent can be allowed, and the union in mind of the inventor of this principle or discovery with the means of its embodiment is conception of the invention. The fact of the conception of an invention is one which public policy demands shall have been so evidenced as to be capable of other proof than the mere allegation of the

inventor that such invention was at a certain time in his mind before it can avail him anything, and as long, therefore, as he keeps his invention unembodied and undisclosed it cannot serve to antedate and thus defeat the invention of a contestant. Berring *v.* Haworth, 14 O. G. 117; Farmer *v.* Brush, 17 O. G., 150; Kinsman *v.* Dickson, M. S., Dec., Vol. 21, p. 323. In the last cited case I stated that—'The reason of this rule is obvious, since the mere conception, while it remains in the mind of the inventor, must perish with him and can add nothing to the world's store of knowledge, and it is, moreover, a matter utterly incapable of rebuttal, and were a party permitted by such a mere allegation of conception to establish priority of invention a premium to false swearing would be offered against which honest inventors could have but little security.' "

Doolittle, acting Commissioner of Patents, says:

"An incomplete conception of a device, or merely conceiving that a simple thing might be done, and showing but partly how it may be done, does not constitute invention as defined either by the courts or the office."

Gordon *v.* Withington, 9 Official Gazette, 1009; C. D. 1876, p. 111.

In the interference case of Voelker *v.* Gray *v.* Edison *v.* Bell et al. Hon. B. Butterworth, Commissioner, in deciding that case in which great interests were involved, the Telephone patent, says:

"As a guide to truth it is safer to rely upon the actions of men than upon their expressed declarations, where the actions and declarations are incon-

sistent. Individuals, as a rule, act and speak in harmony with their own interests, certainly if consistent with truth. All persons reason in the direction of their desires, and resolve doubts in their own favor. When the dim and distant recollection of a party concerning his own or the conduct of another, in a matter of great interest to him who speaks, is found to be wholly at variance with what the known facts in that connection would naturally suggest and prompt, the fair inference is that the recollection of the witness is at fault, and that the logic of the known facts points nearer to the truth. It is natural for persons to hunt hastily through the pigeon-holes of memory where unpleasant or damaging truths are supposed to be stored away; and, on the other hand, it is just as natural to encourage and quicken the pace of a lagging and uncertain recollection which is believed to contain even a fragmentary fact which will tend to mend a flaw in a title through which valuable interests may escape. When an applicant seeks to overthrow a patent granted to one who, though junior in date of conception, has yet shown diligence in filing his application and reducing his invention to practice, the former must in view of the importance, not merely to the patentee but to the general public, show entire freedom from laches. Nothing could sooner bring the patent system into disfavor than to permit a patent granted for a valuable invention in which thousands have become interested to be overthrown by a competitor in the same field of invention on evidence which fails fully to establish the superior claims of the junior applicant to be adjudged the prior inventor. And it is in view of this fact, that doubts are resolved in favor of the patentee. See Cushman v. Parham, C. D., 1876, 130; Wheeler v. Chenoweth, C. D., 1869, 43; McKnight v. Van Wagemen, C. D., 1876, 127; Rich-

ardson v. Denza, C. D., 1870, 156; Morse v. Clark, C. D., 1872, 58; Gray v. Hall, C. D., 1871, 129; Busha v. Phelps, C. D., 1876, 119; Wheeler v. Clipper Mower and Reaper Co., 6 Fisher 1.; Stoner v. Clark, C. D., 1877, 92; Towers v. Pease, C. D., 1878, 6; Sargent v. Burge, C. D., 1877, 62; And also the following court decisions: Ellithorpe v. Robertson (2 Fisher, 83); Union Sugar Refinery v. Matthessen, (2 Fisher, 62). * * * It is not enough that an applicant ranging through the field of experiment unconsciously stumbles upon that which is nearly related and very similiar to the device in controversy. The conception must not be of the result to be attained, but the means (which is the patentable thing) to produce that result. As long as there was a missing ingredient, in the absence of which the means utilized was a failure and the desired result unattainable, the invention was incomplete. The question is, what was in fact, accomplished, not what could have been had the inventor possessed the light which he subsequently obtained, either by research or from a more successful competitor. There is not unfrequently a disposition on the part of an applicant to confound a strong desire in the mind to produce certain results by some means of which he has but a vague and indefinite conception with an intelligent conception of a machine adapted to accomplish those results. It is in such cases that the desire, coupled with the imperfect conception of a device, ripens and matures in the light of subsequent knowledge. That of which the law takes notice is not the maturing, but the matured conception, which can materialize in an operative device; but it very frequently occurs that the inventor confounds his original desire and later conception and gives the latter the date of the former, and does it innocently. In such cases we appeal to the inherent probabilities, which are always the ear-marks of truth. One

> is found in the conduct of men—for instance, where a person has been searching long and earnestly for a valuable thing which he is anxious to utilize, and can only utilize when found by introducing it to the public."

Applying these principles to the case before the court, which reverses the rule of law that the verdict of the court below establishes the contention of the party in whose favor the verdict was rendered, the defense that George Pardy was not the inventor of the machine described in the Letters Patent and that J. D. Hooker was the inventor of such machine is not only not sustained by the evidence beyond any reasonable doubt but it is not sustained by the evidence at all. The only testimony introduced by defendant to sustain that defense is the testimony of J. D. Hooker alone and uncorroborated in a single particular, who testifies after 17 years that it was he who made the sketches for George Pardy (page 124 trans.)

William Pardy testified that in September, 1889, he had a conversation with J. D. Hooker about this pipe riveting machine and that in that interview he stated "that there were two ways of settlement with the estate; either to pay a fair and proper compensation, to-wit, for the riveting machine spoken of or to allow the estate to take out a patent upon it." And that Mr. Hooker replied, "you can take out the patent." (See pages 25-6 trans. In that connection he explains that as executor of the estate he had possession of letters written by J. D. Hooker to George Pardy, in which the question as

to who should own the patent was discussed and that was why he had this conversation with Mr. Hooker, "And wishing to determine the matter I made the proposition that he should control it for a fair moneyed compensation, or the estate should be allowed to take out the patent upon the machine without his opposition." (See page 27.)

A. Hassler testified that she was present at the time of this conversation and her version of the conversation was as follows: "Mr. Pardy said to Mr. Hooker that there were two ways of settling this; one was for Mr. Hooker to pay to the estate of Geo. Pardy a certain amount for his labor, invention, etc., and the other was, that we would take out a patent; and Mr. Hooker replied, 'get the patent.'" (See page 32-3). Mr. Hooker swears positively that no such conversation ever took place. Hooker admits going to see William Pardy after the death of George Pardy, but alleges that his only object was to inquire where Geo. Pardy was buried. Is it reasonable to believe that Hooker told the truth, and that William Pardy and Miss Hassler both perjured themselves? We say, No.

The patent is *prima facie* evidence of everything necessary to its issue. The introduction of the patent in evidence is all the proof that is necessary to establish *prima facie* that Geo. Pardy was the inventor of the machine described therein. In addition to that presumption we have the testimony of William Pardy and Miss Hassler that Hooker said for William Pardy as executor, to take out the patent.

Under the principles set forth in the foregoing decisions, taking the testimony of Hooker in its most favorable light he was not the inventor of the machine. According to his testimony the machine that George Pardy built according to his direction and sketches, was an unsuccessful machine. As was said in Coffin vs. Ogden, *supra*:

> "If the question relating to a machine, as thus exhibited the conception must have been clothed in substantial form which demonstrated at once its practical efficacy and utility."

At page 126 trans., Hooker says:

> "I explained to them the result that I wanted to accomplish and laid out that line of old principles, and I wanted them brought into line and work as we had outlined it. Further than that I could not give any instructions."

Commencing at page 97 Trans., is the testimony of Mr. Hooker as to the various steps and suggestions which he made to Geo. Pardy in relation to having a pipe riveting machine made for him. As the result of his suggestions according to his testimony, Geo. Pardy went back to San Francisco and selected a firm by the name of Rix and Kittridge to take up and manufacture this machine under his supervision, Hooker paying the bills and guaranteeing the account. It took three months to do the work (page 123). Hooker says "they were to take their instructions from Mr. Pardy." That machine was made and brought down and put in place. Mr. Pardy came down with it, because he wanted to see it work. But it was unsuccessful. (page 102 trans.)

Hooker then details how he and his workmen changed and completed the machine so that it worked satisfactorily. In making those changes he says, "Pardy is not in it, he is not any where in it, he is a thousand miles away." (page 109 trans). At the same time, however, the testimony shows that Pardy was at work upon a second machine.

In opposition to Hooker's testimony which is not supported by a single scratch of the pen or by the testimony of any other witness whatever, or any circumstance to corroborate Hooker, we have the testimony of S. H. Gowen that all changes made in the first machine to make it work satisfactorily were made by Geo. Pardy who put the machine up in Mr. Hooker's works. Mr. Gowen worked for Hooker and the defendant company from 1887 until 1903, (page 133). At page 134 Gowen says "there was no material change made in the principles of the first machine, that at first it did not work satisfactorily for awhile but that George Pardy with his assistance made the machine work satisfactorily." Now here is a direct conflict between the testimony of Gowen and Hooker on a material point. Gowen is not interested in the result of the suit. Hooker is the President of the defendant corporation and must necessarily be affected by the result of the suit. Whose testimony is to be believed, the interested or disinterested witness? In opposition to Hooker's testimony, and to establish the reverse of his contention, that he was the inventor of the machine we have Hooker's letters written by him to George Pardy during the time the machine was being

manufactured in which Hooker speaks of the machine as follows:

Letter of Oct. 10, 1887, (page 174):

"Dear Pardy: Your letter, 8th received—glad to hear you are sure you can make the machine. Go ahead with all possible dispatch don't lose any time. I want the trial made of this machine with dispatch and am ready to pay the bill whether or not the venture will work. *If you should fail in this, maybe in another you would not.*"

Letter of Oct. 26, 1887, (page 177-8):

"*Hope your efforts will be as successful as you hope.* Robbins says he goes East to see one of the best men in the known world in regard to making riveting. Told him did not want him to take up our ideas—say Well, patent it then."

Letter of Oct. 29, 1887, (page 178):

"I have a new building ready for *your machine* with shafting, etc.; ready to go in place as soon as you will require it."

Letter, Nov. 25th, 1887, (page 179):

"Dear Pardy: Here you have her. $200 as you request, Rah! Rah! Rah! for the machine of she works."

Letter of Dec. 23, 1887, (pages 179-80):

"The delay and expense O. K. if the machine will prove a success. *It has always seemed to me that the motion to crush the rivets should be like the movement of the die machine at the mint. You know how nicely*

that has to work but you doubtless have investigated that movement."

Letter of Jan. 5, 1888, (page 181):

"Put all the finishing touches upon the Riveter, make its appearance fine, taking that is something to the workmen you know. Do everything you think should be done and then send her forward but in doing this don't delay too long, I cannot possible go up, am to busy, will send you all the pipe you want.—The expense cuts no figure on the first machine—plan a little for a single riveter with holes 7-8 from centers—I, think we must have near two of this size to set a 5 lb. rivet in 4-5 and 6in. pipe light iron, say No. 18 and 16. I am determined to give these machines a good trial. Build a second one as soon as you feel yourself justified in doing so."

(How does this comport with his testimony that he is the inventor)?

Jan. 17, 1888, (page 182):

"Better push another riveter ahead at once with a rush—I want it P. D. Q. The one you shipped has not arrived. No advices of it. Will not keep you any longer than necessary. Are you to send Pete to run it, and set it up? If you have Robbins build these, tie him up in some way that he will not build for any one else. The Lacey crowd will be after him at once."

This from the man who claims he invented the machine.

Feb. 1st, 1888, (page 182):

"I find my new engine will run the main shaft 140 rev.

will this affect *your Riveter* so as to impare its use, if so will have to put in a counter shaft. Please advise by wire."

Why not *my* riveter, if he was the inventor?

Letter, Feby. 17, 1888, (page 183 trans.):

"I have yours of the 9th. Well maybe I get shook up once in awhile. There is going to be lots of work in the future but these hounds go in and kick all the profit there is in a job out of it. However, I think they will tire of it by and by. I don't propose any one shall have those machines if I can help it. * * * Again, as to the machines *I understand I am to own and control the patent upon them paying you a fair and reasonable sum and for all your time and labor and what will be just and fair between us.*"

In letter of March 16, 1888, (page 184): Hooker specifies different parts of the machine which are O. K. going over the whole machine, in reply to inquires from Pardy. In his specification he says, "Gear wheel much easier and smoother since you loosened her. 8-steel pc. on mandrel is as you left it. 9-can't say where *you can improve* except holding down bar at end where George props it with stick of wood. 12—What progress have you made with new machine?"

March 19, 1888, (page 184):

"My men are all on the rampage down here, everything is off but the riveter. George is running her at the rate of 25 joints per hour per day. The work is O. K. How long before you can have a machine to

rivet no. 12 and 14 iron? Will have a lot to make right away."

March 24, 1888, (page 186):

"All our men are on the rampage except the yard men. It is both on account of wages and machine. I am running machine on 6 in. pipe. Sam tried his best to make a bad job of it, find fault with it and is an internal enemy. The machine does well and when we get one or rather two or three more going it will make a bulwark they cannot overthrow."

April 30, 1888, (page 189):

"There are no new defects that I know of, the machine is doing the best work it ever did."

Letter, July 20, 1888, (page 190):

"Send machine, don't keep it for me, I may not go to S. F. but to Tahoe direct—besides I have a machinist here ready to put it in place.

"There are some large jobs to be let along these Sierras. *I don't want to sell these machines,* can make more out of the work, I want to *own the whole business, paying you fairly and square, what would be right,* besides if we get these contracts there will be a chance for you to make more money this way than in Mfrg. machines. *Could I control the coating and machines, it would be worth thousands every year.*—Montague is trying to get a machine for the Lacey outfit here. It would not be very nice to have my enemy at once, have all the things. —I have studied and brought up—it is bad enough to have them cut me out with this coating, *to give them the*

machine would RUIN OUR BUSINESS ENTIRELY. *I would quit before I would follow it.* They bid to cost for work hoping to bust me out and agree to do all I will do—by putting in testing pipe. I got the Riverside work at 10 per cent. above their bid—their object is ruin, am in doubt whether or not it would not be money in my pocket to move away at once."

These letters show the great anxiety which Mr. Hooker had at the time to control the machines and the patent on them. The statements in these letters are utterly inconsistent with the idea that Mr. Hooker was the inventor of the machine. In Hooker's examination, and before he was aware that complainants held these letters he was examined by counsel in relation to getting out a patent on this machine. At page 115, he says, "Pardy suggested that he, Hooker, take out the patent and that he, Hooker, wanted to help Pardy, but said there was no use to take out a patent on it because it was not worth patenting."

And again he makes the puerile excuse as follows: (page 117): "I understand that if any one wanted those machines as a manufacturer and I had none for sale, that he had the right to go and have one made for his own use as against anything I might do. Therefore, having the patent on the machine for me, would be no advantage to me that I could see."

Hooker says at that time he gave Pardy $60 and told him he could make his drawings at his convenience. Now, why should Hooker give Pardy $60 to make drawings if he didn't want a patent? We don't believe that

he gave him any money at all, and we don't believe that Hooker thought any one could make a machine for his own use. Hooker had before applied for patents and obtained them through Pardy. One was for a jack for handling red-wood logs, and another was a patent for a coating of his pipe. (See page 97.)

A partially prepared specification in the handwriting of Geo. Pardy himself, in which it was stated in his writing that he was the inventor of this pipe riviting machine was introduced in evidence. (See page 57.)

Mr. E. E. Osborne, a patent solicitor of San Francisco, from this specification and drawings and material furnished by the executor of Geo. Pardy's estate, prepared the drawings and specifications upon which the patent was issued (pages 38-9). A sketch (page 66 A-B) embodying the essential features of the machine shown in the letters patent was introduced in evidence, and William S. Pardy, a son of one of the complainants identified it as a sketch made by Geo. Pardy deceased, in the latter part of the year 1887, and that it was made after a conversation between George Pardy and Mr. Hooker. He states that Mr. Hooker told his uncle Geo. Pardy that he, Hooker, would like to get a riveting machine that would rivet pipe, and that if he could get up such a machine he could make some money out of it. That at the time no suggestions were made by Mr. Hooker to Geo. Pardy, in relation to the construction of such riveting machine. (See pages 40-1.)

The court below decided the case on the unsupported

and uncorrobated testimony of J. D. Hooker that he was the inventor of the machine, notwithstanding it was incumbent upon the defendant to establish beyond all reasonable doubt that Hooker was the inventor of the machine. Does his testimony viewed in the light of ordinary business experience, and in the light of the letters written by him at the time warrant this decision? We say, No. In the first place his letters show that a successful pipe riveting machine was very necessary in his business and that he was extremely anxious to obtain one. They also show a great anxiety to prevent his business rivals from obtaining one of these machines. They also show that he was very anxious to control the patents on the machine. The testimony shows that the machine was a successful machine. The testimony shows that Geo. Pardy made a sketch, which embodies the essential features of the machine, immediately after a conversation held with Mr. Hooker, in which Hooker stated that he wanted a pipe riveting machine, but did not detail its construction. Hooker's letters will bear no other construction than that the machine which Geo. Pardy was then building was not the product of any plan prepared by Hooker. His letter of Dec. 23, 1887, page 179, clearly states that the machine which Geo. Pardy had built was not built on any plan suggested by Hooker as he says *"It has always* seemed to me that the motion to crush the rivets should be like the movement of the machine at the mint." Why should he make such statements if the machine was built accord-

ing to sketches prepared by himself? We have the testimony of both complainants that Mr. Hooker stated that William Pardy as executor should take out the patent on this machine. We have the fact that notwithstanding the anxiety shown by Mr. Hooker in his letters to own the patent on the machine and the further fact that he testified he paid Geo. Pardy $60 for preparing the drawings, Hooker did nothing toward obtaining a patent on the machine which was a *"bulwark to his business,"* (letter, page 186). These facts are entitled to a great deal more weight than Mr. Hooker's interested statement that he was the inventor of the machine.

Another peculiar circumstance in connection with Hooker's testimony is that Hooker testifies that these conversations which he had with Geo. Pardy, and these alleged sketches which he gave to Geo. Pardy relating to this riveting machine, which his letters show he was so anxious to have, occurred in the arly part of 1837, January, February or March, (page 123), while the letters show that Geo. Pardy did not begin upon the work of constructing the machine until October, 1887.

Another statement of Mr. Hooker's is also very peculiar. Mr. Hooker testified that his agreement with Mr. Pardy in relation to building this machine was that he would "simply pay him his charges for the time he was employed," (page 123). And that he had overpaid him for his time but kept no account or receipts of the amounts paid. That he would be in Pardy's office when Pardy would say he was short of money, hadn't got money to pay his room rent with, and then Hooker

would ask him how much would satisfy him and Pardy would say so much and Hooker would give it to him.

At the same time that Hooker stated these requests were made by George Pardy we showed by George Pardy's bank books that at all the time he was building these machines for Hooker he had a balance in the bank, and that on one occasion he loaned Hooker $100. In Hooker's letter of May 6th, 1889, to Geo. Pardy, (page 191, he writes: "I propose to do the square thing with you and I don't think you ever knew me to do otherwise. I shall be in S. F. shortly when I will see you. You have not paid out any of your money for me. I will make it plain to you."

This last letter shows that at that time Pardy was claiming that he had paid out money for Hooker and was asking the return of it.

On all points Hooker is contradicted by his written admissions made at the time of the transaction and by the testimony of all the witnesses.

Hooker says "he made sketches and gave them to Geo. Pardy and detailed to Pardy the principles of the machine. In none of the letters of Hooker is anything of the kind claimed. On the contrary they show that the plan was Pardy's.

Wm. S. Pardy says that he heard a conversation between George Pardy and Hooker, in which Hooker stated that he wanted a machine for that purpose but gave no instructions as to how it was to be built, and on the same afternoon, after Hooker left his uncle's office, George Pardy made the sketch which was introduced

in evidence and is found at page 66 A-B, which shows the substantial principles of the patented machine.

Hooker says that the first machine was unsuccessful and that he and his workmen principally Stellow, worked with the machine until he made it work successfully.

S. H. Gowen says that George Pardy came down from San Francisco, and that he and Pardy worked on the machine until it was put in good working order. In Hooker's letter of March 16, 1888, he admits that George Pardy had been at work on the machine because he says *"Can't say where you can improve* except holding down bar at end where George props it with stick of wood, also gear wheel works much easier and smoother since you loosed her."

Either Hooker told the truth or Gowen did. Hooker's letter of March 16, 1888, corroborates Gowen. If Hooker would swear falsely in this matter, why would he not swear falsely in all other matters? Hooker was an interested witness. Gowen was not.

Hooker's statement that he didn't want to get out a patent because it would be of no use to him is flatly contradicted by his letters written at the time. His reasons given when his testimony was taken, for not wanting to take out the patent are so foolish that they bear the stamp of untruth.

That the machine was very valuable in Hooker's business, his letters written at the time show; that he was very anxious to control the patent on the machine, his letters also show.

Which statement is to be believed? Hooker's written statement made against his own interest and at the time the transactions occurred, or his statements made 17 years later that he did not want a patent on the machine because another manufacturer could make one for his own use if he, Hooker, did not have them for sale?

We have the testimony of two witnesses that Hooker stated that the estate was to take out the patent on the machine and against this we have Hooker's uncorroborated statement that he did not so state.

Under the rule above established, the testimony of Hooker should have been corroborated, whereas, there is not an incident or circumstance in his letters or in the testimony of any of the other witnesses which has a tendency to corroborate him. We are unable to find a single incident which has a tendency to do so, whereas, the whole case teems with circumstances which show that his testimony is very unreliable. The letters written by him at the time would have disclosed some circumstance inconsistent with the fact that Pardy was the inventor, if it were not true, but they do not.

Can the Judges of this court believe that the unsupported testimony of Hooker, contradicted as it is in material matters of which there could be no mistake, *furnishes them with evidence sufficient to satisfy them beyond any reasonable doubt,* that Hooker was the inventor of the machine described in the letters patent? If his testimony does not produce that conviction then

the prima facie case made by the introduction of the letters patent was not overcome and the judgment of the court below should be reversed with instructions to find a decree for complainants.

Respectfully submitted,

G. E. Harpham,

Solictitor for Appellants.

Hazard & Harpham.

of Counsel.

Delay does not prejudice
US vs American Bell Tel Co
167 US 246-7

IN THE

UNITED STATES
Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

No. 1322

William Pardy and Albertine Hasler, *Appellants,* *vs.* **J. D. Hooker Company (a corporation),** *Appellee.*	

FILED
MAY -7 1906
F. D. MONCKTON,
CLERK

APPELLEE'S BRIEF.

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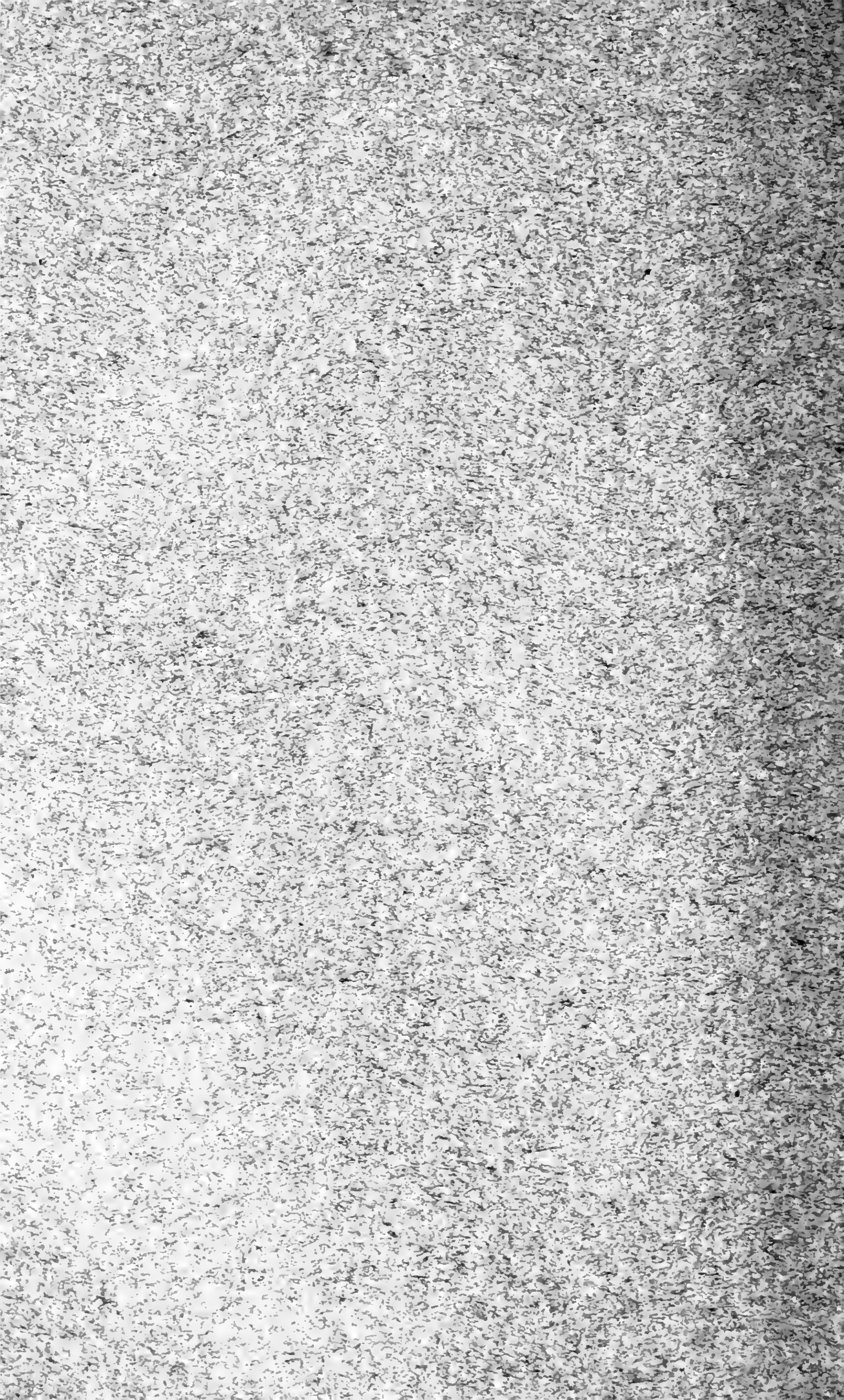

IN THE

UNITED STATES
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William Pardy and Albertine Hasler,

Appellants,

vs.

J. D. Hooker Company (a corporation),

Appellee.

APPELLEE'S BRIEF.

STATEMENT.

Appeal from a decree of the Circuit Court of the United States, for the Southern District of California, Southern Division thereof, in equity, entered and recorded December 1st, 1905; declaring United States letters patent No. 434,677, set forth in the bill herein, void in law, and that George Pardy, deceased, was not the inventor of the machine described in said letters patent. The action is for an injunction restraining defendant

from using a machine alleged to have been built in infringement of the patent, and for an accounting of profits.

The bill of complaint alleges that one George Pardy invented certain new and useful improvement in riveting machines, prior to August 20th, 1889, and that thereafter said Pardy died testate; and through his will, and an assignment set forth, the plaintiffs are owners of his rights and the rights of his estate. That after his death, and on the 16th day of December, 1889, William Pardy, as his executor, applied for letters patent of the United States on the alleged invention, and such letters accordingly issued on the 19th day of August, 1890, numbered 434,677. That on or about February 13th, 1895, the defendant, J. D. Hooker Company, was organized; and that thereafter, and before the commencement of this suit, the defendant has unlawfully used one or more pipe riveting machines, each containing and embracing the alleged invention, and has infringed upon the rights of the complainant secured by said letters patent, and has made and realized large profits therefrom, to an amount not specified. The prayer is for an injunction and accounting.

The answer denies that said George Pardy was the inventor of the alleged improvements in riveting machines; and alleges that the said Pardy was employed by J. D. Hooker to construct certain experimental machines embodying certain improvements in riveting machines invented by said Hooker and then and there divulged to said Pardy by said Hooker.

That said Pardy constructed experimental machines in performance of said employment, all embodying said

invention of Hooker; and upon completion thereof, Hooker suggested certain material additions thereto and changes therein, some of which were made by said Pardy, and some by others. That said Hooker paid for the materials used, and paid said Pardy for his services in full.

The answer further alleges that *said William Pardy, acting as executor of said George Pardy, deceased, seeking surreptitiously to appropriate said invention, or so much thereof as is embraced in the claims of the patent sued on, unjustly and unlawfully filed in the patent office of the United States an application for said patent, wherein he falsely alleged the said George Pardy to be the inventor thereof, and thereafter he surreptitiously and unjustly obtained the patent sued on for that which was in fact invented by said J. D. Hooker, who was using reasonable diligence in adapting and perfecting said invention.* [Tr. pp. 15, 16.] The answer further alleges that said Hooker, with the full knowledge of said George Pardy, had several other machines similar to said first machines, constructed, and also one or more machines embodying some of the features of said machines; *and continuously used all of said machines, with the full knowledge of, and without any objection by, the said George Pardy.* [Tr. pp. 16, 17.]

POINTS AND AUTHORITIES

POINT I.

The defence in this case is not priority or anticipation, but that George Pardy was not the inventor but a mere mechanic employed to embody Hooker's invention in a machine; and that William Pardy surreptitiously and wrongfully obtained the patent. Therefore, the rule requiring the establishment of the defence beyond a reasonable doubt has no application. The case is like any other case of fraud, and a preponderance of evidence wins.

The evidence was taken before a special examiner and by depositions; and the case was heard upon oral argument at circuit before Mr. Justice Wellborn, who decided the case in favor of the defendant—appellee—and again *in extenso* before said judge, upon a motion for a re-hearing, on which he adhered to his decision; and thereupon decree was made and entered, that the said George Pardy was not the inventor of the subject of the letters patent, and that the letters patent are void in law. [Tr. pp. 17, 18.]

It should be observed at the outset, *that we are not confronted with the oath of George Pardy upon the application for the patent, that he was the inventor;* but with the oath of Pardy's executor, which is *based upon his conclusion*, drawn from alleged conversations with George Pardy, and upon letters from Hooker to Pardy, which, as will be seen hereafter, fall far short of sustaining such conclusion.

Every one of the cases cited by the learned solicitor for complainants upon this point are cases wherein it is admitted that the complainant invented something, but it is claimed that such invention was not new: that some one else was a *prior* inventor, and had *anticipated* the complainant. We concede that in such cases, the defense must be made out beyond a reasonable doubt.

The *raison d'etre* of the rule is obvious. Upon a question of priority or anticipation, two classes of questions are involved: 1st, do the records (United States or foreign) show any prior invention substantially covering the one in suit? and 2nd. did the defendant in fact invent the subject of complainant's patent (which *ex necessitate* the defense admits complainant invented) before the complainant made the invention?

As to the first, the determination depends on an examination of the official records of the patent office, made by the experts employed for the purpose by the government; and it is highly proper that their conclusion as to priority or non-priority should only be disturbed upon proof beyond a reasonable doubt.

As to the second, the contention of the defendant rests upon evidence of alleged facts, which, in the nature of the case could not have been brought to the notice of the patentee, and which usually rest in the memory of witnesses, dating years back; and which, consequently, the patentee has no means of contradicting. It is eminently proper that such evidence should be closely scrutinized; and that it should satisfy the judicial mind beyond a reasonable doubt. So we repeat:

The reason of the rule of reasonable doubt furnishes

the best test of its scope, and non-applicability to the case at bar.

The following cases well illustrate the reason of the rule:

Williams Shoe-button-fastener Co. v. Webb, 89 F. R. 982.

Questions of *invention and anticipation.* Hammond, J.

> 996 "A patent is of itself *prima facie* evidence of "its validity, and the defendant must show by proof *"that the patent office has erred on that score,* and "the proof must be conclusive against any fair "doubt on that point." Citing
>
> West. El. Co. v. Howe Tel. Co., 85 Fed. 649.

Thayer v. Hart (improvement in necktie shields), 20 F. R. 693:

Question of priority.

> "The complainant's patent *antedating* the de-"fendants', it was incumbent upon them to prove "beyond a reasonable doubt that theirs *was the* "prior invention. This they have by proof so posi-"tive that the plaintiff's counsel conceded for the "argument that the date of their invention was Jan. "15, 1877; eleven months prior to the filing of the "complainant's application. This date being fixed "the burden was transferred to the complainant to "satisfy the court by proof as convincing as that "required of the defendants that his invention pre-"ceded theirs. The rule in such cases is very strict. *"It is so easy to fabricate or color* EVIDENCE OF "PRIOR INVENTION and SO DIFFICULT TO CONTRA-"DICT, that proof has been required which does not "admit of reasonable doubt."

Facts not presumably in knoweldge of patentee.

Western El. Co. v. Home Tel. Co., 85 F. R. 649:

Question of *novelty.* Tomlin, J.

> 659. "The grant of letters patent is *prima facie* "evidence that the patentee is the first inventor of "the device described in the letters patent and of its "*novelty*. The burden of overcoming the *prima* "*facie* case made by the production of the patent is "upon the defendant, and the *defense of want of* "*novelty* must be clearly established before the court "will be justified in setting aside the patent on this "ground. Not only is the burden of proof to make "good *this defense* on the party setting it up, but it "has been held that every reasonable doubt should "be resolved against him."

In the barbed wire patent, 143 U. S. 275, so much relied upon by appellants, the only questions were *anticipation* and *novelty*.

The learned solicitor for appellants does not cite a single case, and, after an exhaustive search we have been unable to find one, where, the defense being surreptitious obtaining of letters patent, the rule of reasonable doubt has been even suggested.

The gist of this defense is that the patentee, knowing the defendant to be the inventor, fraudulently and secretly applies for and obtains the patent. The guilty *scienter* of the patentee is a question which obviously is not presented to the examiners in the patent office, and just as obviously rests in facts *known to the pretending applicant*. Taking the case at bar as an illustration: if George Pardy had applied for this patent, he would have done so knowing all the facts upon which the defendant relies; and, if these were not facts, the evidence would be easily within Pardy's reach. For, it is nowhere pretended that Pardy ever thought of a riveting machine before Hooker gave him his idea and employed him to embody it in a machine. On the contrary, it is admitted

that whatever Pardy did was upon the employment of Hooker. Thus the question narrows down to this: Did Hooker give Pardy the essential ideas, or did Pardy, after learning Hooker's want, give Hooker the essential ideas? And the answer to this question is found, not in the examination in the patent office, nor in the testimony of witnesses never seen or heard of by Pardy, of remote transactions; but *in the evidence of transactions between Pardy and Hooker. Hooker's defense depends upon proof of Pardy's knowledge.* We therefore insist that the reason of the rule of "reasonable doubt" does not exist in this case, and that the ordinary rule of "preponderance of evidence" applies, as in any ordinary case involving questions of fact. It should be added, that the evidence on both sides of this case is, that George Pardy's attention was first drawn to making riveting machines by Mr. Hooker's employment of him to make the machine in question. [Compl. wit. W. S. Pardy, Tr. p. 40; and Hooker's testimony.] Consequently the question before the court is simply this transaction between the two men. Did Hooker show Pardy, or Pardy show Hooker? Obviously this question was not before the patent office; and it has none of the elements of questions of priority or anticipation which give rise to the rule of reasonable doubt. It is just like any ordinary question of fact, to be proved by a preponderance of evidence.

POINT II.

The chronology of the case is a demonstration of the invalidity of the executor's claim to the patent. Complainants must stand or fall in the executor's shoes. If he had no rights, they have none.

We again call the attention of the court to the fact that the patent in suit was not obtained upon the oath of George Pardy, but upon that of his executor, *based upon alleged conversations with George Pardy which the executor did not vouchsafe to repeat* [Tr. p. 26, Ans. 17], and upon letters of Hooker *which do not even tend to support the claim.* The pertinency of this will appear from the chronology of the case.

Mr. Hooker first considered riveting by machine about January or February, 1887. [Tr. p. 93, A. 22.] Having conceived the idea of crushing the rivets by means of a heavy wheel, under pressure, passing over steel rivet sets held over the rivets by a steel bar having holes to receive the rivet sets; he communicated the idea to Mr. Pardy. Just when he told Pardy is not quite definitely fixed by the evidence; but it was certainly some time before October 8, 1887; for complainants' Ex. 5 [p. 174], Hooker's reply to Pardy's of Oct. 8, 1887, is that he is glad Pardy is sure he can make the machine. Prior to January 19, 1888, the first machine was shipped to Hooker's factory. [See letter, p. 182.] As early as February 17th, 1888, Hooker wrote to Pardy: "Again as to the machines I understand I am to own and control the patent upon them, paying you a fair and reasonable sum for all your time and labor, and what will be fair

and reasonable between us." This was notice to Pardy that Hooker claimed the right to patent the invention. Hooker testifies that Pardy wanted him to take out a patent; and, upon his declining, Pardy then said he, Pardy, could take out the patent in his own name, if Hooker wanted. Hooker then said, "How can you do that?" to which Pardy replied, "Well, if you don't object there is nobody to stand in the way of it. I can take out the patent in my name and assign it over to you if you want to and I make my fee." [Tr. pp. 116, 117, 118.] At some time George Pardy commenced specifications for a patent in his own name; but he never finished them—did not even get to the statement of claims. [Tr. pp. 57 to 66.] George Pardy died August 14, 1889, without having applied for a patent. In other words, this skilled mechanic and patent solicitor, knowing that Hooker claimed the invention, and having requested Hooker to let him take out the patent in Hooker's or his own name and been refused, allowed a year and eight and a half months to elapse without asserting any right whatever to the patent by applying for it, or otherwise. He never stated to the builders, Rix and Furth, that he was the inventor [Tr. p. 127, Q. 168.]; nor to his friend Edward E. Osborn, the patent solicitor who obtained the patent for the executor [Tr. p. 37, Q. 3 etc.]; nor to his friend Norman Selfe [Tr. p. 67], to whom he wrote, Oct. 22, 1887, that he was *making* a riveting machine,—not that he had *invented* one, and asks if a patent therefor would be valuable in New South Wales and other colonies. Not a single witness was produced to testify to a single conversation in which Pardy told anyone that he

had invented the machine. The testimony of executor Pardy and Miss Hassler fall very far short of being such evidence. Indeed, executor Pardy does not pretend to swear to anything but his alleged *inference from conversations* with his brother and from Mr. Hooker's letters. We submit that taken in connection with Hooker's written warning to Pardy, Pardy's knowledge of the patent law as a solicitor, his belief in the great value of the machine, and his failure to claim the invention to anyone, and the lapse of time between the shipping of the machine and Pardy's death; the unfinished and abandoned specifications in Pardy's name are an unanswerbale evidence of the fact that he knew he was not the inventor. *Further as to lapse of time.* Executor Pardy testifies that he had a conversation with Mr. Hooker in September following his brother's death about the alleged claim of the estate. On cross-examination he admits that he never discussed the matter with Hooker on any other occasion, and does not recall ever having written to him. [Tr. p. 30.] He dodges behind a convenient lapse of memory as to when he first learned Hooker had made a new machine, until, being pressed, he admits it was previous to November, 1893. This suit was not brought until 1904, although the patent was issued August 19, 1890. In other words, the executor allowed fourteen years to elapse after this alleged interview with Hooker, without a word to Hooker, written or spoken, and then, without other warning brought action against him; and during eleven of those years, he knew, according to his own admission, that Hooker had made the machine and infringed the patent, if it was valid. *During this long time*, misfortune overtook Hook-

er in the shape of fire which destroyed his evidence, letters from George Pardy and original sketches of the machine drawn by Hooker; and death, which sealed the lips of George Stellow, the trusted machinist who had stood by Hooker and the machine, until they perfected it and made it justify. [Tr. p. 139; as to Stellow, pp. 122, 121, 119, 114, 111, 110, 109, 108, 106, 105, 104, 103, and Exh's. 19. p. 184; 20, p. 185; 22, p. 187; 24, p. 188; 25, p. 189.] We submit that the conduct of the complainants is open to but one construction. *They lay silent and dormant fourteen years, because they knew that this patent, granted, not upon the oath of Pardy the mechanic employed to embody Hooker's invention in a machine, but upon the oath of the executor of the estate, who says he inferred that "the question of the future con-"trol of the patent riveting machine was an open ques-"tion between Hooker and George Pardy* [Tr. p. 28, Q. "24.], *could never stand judicial scrutiny."* And now with Hooker's main guns forever silenced, they sally bravely forth, armed with this alleged patent and boasting its sacredness in the eye of the law and quoting well known opinions on presumptions and degree of proof, and ask the court to say that John D. Hooker is a thief and rank perjurer. For that is what it means. There is no half way ground in the case. Either Mr. Hooker deliberately built the machine knowing he was infringing a valid patent [Tr. p. 83], and then sought to escape judgment by the most deliberate, detailed and sustained prejury; or he, as inventor, lawfully used his invention and truthfully defended his rights. The learned judge at circuit refused to find the defendant guilty of

these wrongs, upon the gauzy evidence adduced by the complainants. He laid great stress, we may be permitted to say, upon the fact that the patent was not founded on the oath of George Pardy, but of his executor. He regarded the fact that Pardy, mechanic, inventor, patent solicitor, evidently impressed with the value of this machine, had never even finished specifications, much less applied for a patent for a period of two years, as of most telling weight; and could not see that the fourteen years delay of the executor and other complainant in notifying Mr. Hooker of their claims lessened its weight.

We submit that these lapses of time, under the circumstances of the case, are alone sufficient to warrant the decision of the learned Circuit judge.

POINT III.

The single witness called by complainants to testify to the res gestae, Sam Gowan, is shown by the record to have sworn falsely as to who perfected the machine after it failed to justify. There being no other evidence to contradict defendant's testimony that he and his foreman Stellow perfected the machine, the defendant's evidence on this point is conclusive.

Sam Gowan was a foreman in the pipe factory, *and an enemy to the defendant's riveting machine. The first suspicion was evidently cast upon him by George Pardy himself, before the first machine had arrived in the factory.* This is conclusively shown by complainants' Ex. 6. [Tr. p. 175.]

"Los Angeles, Cal., Oct. 14, 1887.

"George Pardy, 402 Mty. St., San Francisco:

"Dear Pardy—Herewith please find C. K. to your or-"der for 300. XX the strip of iron with holes will go by "express tonight to Robbins. Don't let Robbins into your "confidence, he is after this very thing. *You are quite "right in your suspicion as to the matter of Sam's leak-"ing. He will work against everything to take place of "men.* Hence it will hardy do *to trust anything what-"ever to him. He will make the machine a failure if he "can, depend upon that—we wont let him however.* The "Jardine punch has been made exactly to conform to the "Robbins punch—so only one strip will be sent. Doyle "has not shown up.

"Yours truly,

"HOOKER."

Again, complainants' Ex. 21 [Tr. p. 186]:

"Los Angeles, Cal., Mch. 24, 1888.

"Dear Pardy:

"All our men are on the rampage except yard men, "it is both on a|c of wages and machine. I am running "machine on 6-in. pipe. *Sam tried his best to make a bad "job of it finds fault with it & is an intense enemy.* The "machine does well and when we get one or rather two "or three more going it will make a bulwark they cannot "overthrow. * * * *Sam is going to buck us Monday— "We will let him out I think.* * * *

"Faithfully,

"JNO. D. H."

Again, complainants' Ex. 22 [Tr. p. 187]:

"Los Angeles, Cal., Mch. 29, 1888.

"Dear Pardy:

"The prime cause of the strike is the machine. The "round seamers combined not to put the machine pipe "together—they had it all cooked for us, but we will "carry our point. Have taken on a new crew and are "getting on fairly well. *Sam did his level best against*

"us and is out—wants to get back but I am afraid of "him. * * *

"Yours faithfully,
"J. D. Hooker."

These letters are part of the *res gestae,* and give the true history of the case. They were written to keep Pardy posted as to the success of the machine, and the attitude of the factory hands toward it. They show that Pardy's suspicion of Sam Gowan was well founded.

In the face of this evidence, Gowan's testimony that he and Pardy perfected the machine together, and that he was in charge of the machine, is preposterous, and utterly destroys his credit. Further, the letters completely corroborate Hooker's testimony. [Tr. p. 158, 159, 160.] He says:

(Answer 91.) "Sam Gowan was the superintendent, "and he is the man that led the strike and led the men "out of my works, and was an enemy to the machine." (Q. 93) "And he is not now with you? A. No sir. "Q. Well what were his relations towards you when "he left there? A. Amicable I guess. I never allowed "him to handle the machine, and he never did one turn "with it. 'Amicable'—if leading a strike was amicable. "He went out, led a strike. Q. Was he discharged at "the time he struck? A. Yes sir. Q. And he never re- "turned? A. No sir." The witness continues that Gowan had nothing to do with the experiments with the machine and reiterates [Tr. p. 160]: *He had nothing to do with the management or handling of the machine. I dared not trust him.* As before observed, this testimony tallys exactly with Hooker's letters written to

Pardy at the time of the transaction, and is obviously true.

The motive for Sam Gowan's false testimony is not far to seek. The memory of the establishment by Hooker of a machine "to take place of men;" the memory of George Stellow's fidelity to Hooker and consequent preferment over Gowan; the memory of the futile strike and Gowan's discharge, still rankled in the breast of this man as he was sworn to tell the truth. He thought he saw his chance to get square with Hooker, the inventor and mentor of this labor-antagonizing machine, and the man who humbled and discharged him; and with the same bravado and disregard for duty which led him to lead a mutiny against machine and master, he testified falsely as he did. We submit that as a witness in this case, Sam Gowan is *down and out.* It is a desperate case indeed, in which counsel feel compelled to call such a witness.

But it is important in this connection to note another fact which these letters of Mr. Hooker to Mr. Pardy conclusively establish. Mr. Hooker testified in detail to various material changes in the original machine which he and George Stellow, the dead machinist made. — Would that poor Stellow had survived as long as the letters! — Hooker also testified that Stellow remained faithful to him and his machine. The only evidence adduced to contradict Mr. Hooker on this point is that of striker Gowan [Tr. 136]: "Q. 31. Were any "changes made in that first machine by. Mr Stellow? A. "No. Q. 32. Were any changes made on any of the "pipe riveting machines that were used by Mr. Hooker

"by Mr. Stellow? A. Not only just simply in the adjust-
"ments."

Let us examine the letters to Pardy again. In the letter of March 19, 1888 [Ex. 19, p. 184], we find the statement: "George is running her at the rate of 25 joints "per hour today—the work is O. K."

Again, Mch. 16, 1888 [Ex. 20, pp. 184-5]: *"George "has made two new ones but they are too high so machine does not set rivet down as it should. Has gone "back to the old ones which he has finished down.* The "work is finest yet," etc.

Again, Mch. 28, 1888 [Ex. 21, p. 186]: "I have a "man to take George's place if he gets knocked out."

Again, Mch. 29, 1888 [Ex. 22, p. 187]: "The new sets "work fine. George is highly pleased with them * * * "—he says the joint slides a trifle sometimes."

Again, Apl. 11, 1888 [Ex. 24, p. 188]: "George is "doing good work with this riveter though he breaks "too many sets by crushing it down too hard. I have "him now where he will do well, I am sure."

These letters conclusively show that the adaptation and perfecting of the machine were being done by Mr. Hooker and the machinist, George Stellow. And there was every reason why Mr. Hooker should have done as he says [Tr. p. 108]: "My object in bringing Mr. Pardy "down was that he should confer with Stellow, and see "what we had accomplished with that other machine; "and therefore I brought him down. And we went over "the method of putting in a machine to rivet in double "rows, and then he went back with the gatherings we "had given him of the way we wanted the thing to do "and put the machine together."

It were useless to multiply details. With Sam Gowan hopelessly discredited and contradicted, and not a shadow of evidence in the case even tending to contradict Mr. Hooker's testimony that the first machine would not work until he and Stellow made the requisite changes, perfected it and made it work; we submit that the defendant has demonstrated that George Pardy's attempt to embody the defendant's invention in a practical machine did not succeed. Success was achieved by Hooker and his machinist Stellow.

POINT IV.

The account given by Mr. Hooker of his invention of the riveting machine bears the stamp of truth on its face. He undoubtedly conceived the idea, and employed Mr. George Pardy as a skilled mechanic to make drawings and superintend the construction of a machine embodying the invention. Mr. Hooker was, therefore, the inventor, and Mr. Pardy was not entitled to a patent on the machine.

1. We call attention at the outset to the fact that Hooker had had long and full experience in the art of cold riveting sheet steel pipe for irrigation purposes; but practically no experience in general mechanics. He knew what he wanted to do, and how he wanted to do it, but had not the knowledge of the breaking strain of materials, requisite power, and the like purely mechanical matters, to fit him to make working drawings and superintend the details of construction. On the other hand, Pardy was a mechanical engineer and patent solicitor,

having the requisite knowledge to make such calculations and drawings, and superintend the details of construction; but knew nothing about this cold riveting art as practiced.

2. "An employer who conceives the result em-"braced in an invention, or the general idea of a "machine upon a particular principle, and in order "to carry his conception into effect necessarily em-"ploys manual dexterity, or even inventive skill, "in the mechanical details and arrangements, is nev-"ertheless the inventor and entitled to a patent as "against the servant who was the mere instrument "through which he realized his idea."

King v. Gedney, Fed. Case No. 7,795;

1 McArthur, Pat. cas. 443;

Wellman v. Blood, Fed. Case No. 17,385;

1 McArthur Pat. Cas. 432.

"Where an employer has conceived the plan of an "invention, and is engaged in experiments to perfect "it, no suggestion from an employe not amounting "to a new method or arrangement, in itself a com-"plete invention, are sufficient to deprive him of the "exclusive property in the perfected improvement; "but otherwise where the suggestions embrace all "that is embodied in the patent subsequently issued "to the person to whom the suggestions were made."

Agwan Wollen Co. v. Jordan, 74 N. S. (7 Wall.) 583; 19 L. Ed. 177.

In other words, if the conception of the employer is such that a skilled mechanic employed by him can make the machine from the information imparted to him by the employer, the employer is the inventor.

3. The principle of the machine in suit is extremely simple. For this, we have the word of George Pardy

himself. In his letter to Norman Selfe of Oct. 22, 1887, [Comp. Ex. 6, Tr. p. 67] Pardy says: "Machine is a "very simple affair, simply a heavy roller adjustable to "press from 3 to 10 tons on top of a series of steel sets "held in a bar and set on top of rivets, the roller is pro- "pelled by two screws one on each side." We quite agree with Mr. Pardy. No high degree of inventive skill was required to conceive the idea, and no very great mechanical skill was necessary to make the machine.

It is conceded that Hooker first conceived the idea of riveting his pipe by machine. Pardy never gave the matter a thought, until employed by Hooker.

Now nothing could be more natural than the conception of using a roller to crush the rivets, from observing a locomotive driving wheel crush a bit of iron on the track. This Hooker testifies was what suggested the roller to him. The mandrel, or cylindrical steel bar over which the pipe is slipped, the butts of the rivets resting on its upper surface, was in daily use in his shop. The simple experiment of standing a row of rivets on the railroad track, at once showed that direct contact of the roller with the rivet ends would not do, because it bent the rivets off sideways. [Tr. pp. 94, 95.] Then came the next idea "that if we put the rivet set through the "bar that we had on the round seam stick, like this, and "let the wheel run over it, it could not get away from "it." Now this, the court perceives, gives a perpendicular thrust, without lateral motion, the rivet sets being fitted snugly in the holes in the set bar, as shown at B, B, Fig. 7, in the drawing. [Tr. p. 165.] And here we have a very pretty bit of corroboration, in a letter from Hooker to Pardy of Dec. 23, 1887 [Tr. pp. 179, 180, Compl.

Ex. 13]: *"It has always seemed to me* that the motion "to crush the rivets should be like the movement of the "die machine at the mint *you know how nicely that has to "work,* but you doubtless have investigated that move- "ment." Unfortunately we have not Pardy's letter, to which this was a reply. It would seem that Pardy had suggested some change from Hooker's plan; but Hooker sticks to his plan, which he has *always* considered best; and the machine today has the original conception, the direct thrust, working "nicely", (*i. e.,* exactly and without lateral play), of the die machine. The I beam forming a track upon which the car runs bottom side up next suggested itself, etc. etc. Mr. Hooker testifies to all this in detail [Tr. p. 94, *et seq.*], and it is not necessary to pursue the testimony further here. Suffice it to say that there is no evidence in the case which even tends to contradict Mr. Hooker's positive statement that he conceived the entire arrangement, and communicated it to Pardy.

Here is the place to dispose of young Mr. W. S. Pardy's testimony. An attempt was made to throw doubt upon Mr. Hooker's testimony by young Pardy's testimony to an interview between Hooker and George Pardy at the last of September or first of October, 1887. [Tr. pp. 40, 41, 42.] In substance his story is that he called at the office of his uncle George in the morning, and found Mr. Hooker there telling about the possibility of making a riveting machine. That in the afternoon his uncle sat down and made the sketch [Compl. Ex. 5, Tr. p. 66a]; and that no suggestions were made in his presence by Mr. Hooker to his uncle at that time in relation to the construction, the manner of construction of such

patent riveting machine. [Tr. p. 41, Q. 12.] From this, complainants' counsel draws the inference that Hooker imparted nothing to Pardy. The answer is twofold. First, there is no evidence at this point or elsewhere that this was the first consultation on the subject between the two. On the contrary, according to Hooker's uncontradicted testimony the first consultation occurred months earlier. Second, young Pardy frankly admits that Hooker had been in his uncle's office "an hour or so" before he, young Pardy, arrived. [Tr. p. 44, Q. 20.] This time was easily long enough for Hooker to have communicated this simple device to Pardy. *Non constat* from this evidence, but that Hooker had gone over the whole thing and given Pardy the data from which he made the rough sketch; and that young Pardy only got there in time to hear the general talk of the value the machine would have. Such evidence, we submit, proves nothing; and is worthless as against the detailed, circumstantial testimony of Mr. Hooker. It would certainly be a great injustice to convict Mr. Hooker of perjury and mulct him in damages, on such inconclusive testimony. It seems to us a rather wild suggestion, that Pardy, having no knowledge of the art, should have sat down after his first interview with Hooker, in which Hooker made no suggestions, and sketched a machine embodying so many features which were daily seen by Hooker in and about his factory. The thing is absurd on its face.

Before giving a brief outline of the substance of Mr. Hooker's testimony it is necessary to advert to a passage of complainants' opening brief, at page 17. Counsel here quotes Hooker: "I explained to them the result that I "wanted to accomplish and laid out that line of old prin-

"ciples, and I wanted them brought into line and work "as we had outlined it. Further than that I could not "give any instructions." Segregated as it here is, this passage gives a very warped idea of Mr. Hooker's testimony. The key to it is found in the words "as we "had outlined it." Beginning at page 94 and through page 102, Mr. Hooker describes in detail the way in which he conceived the idea of the machine, and imparted it, feature by feature to Pardy, in Los Angeles: how it was agreed, step by step, that the machine with these several features would be feasible; how Hooker made sketches and gave them to Pardy; and how, after all this information was given by Hooker, Pardy went to San Francisco and made the machine in accordance therewith. This renders the passage quoted at p. 17 perfectly clear. It is true that Hooker testified that the machine would not work, and that he and Stetlow worked over it until they made it work; and this evidence is not only not contradicted, except by striker Gowan, but is corroborated by Hooker's letters written at the time to Pardy. We have abundantly shown in point III *supra,* that Gowan's testimony that *he and Pardy* perfected the machine together was false; as Pardy warned Hooker against Gowan before ever the machine was received, Hooker agreed with the warning and "never allowed "him to handle the machine, and he never did one turn "with it". [Tr. 159, and see letters, Ex. 6, p. 175; Ex. 21, p. 186; Ex. 22, p. 187.] How the learned counsel for complainants' can claim support from these letters or Gowan, it is difficult to see.

We come finally to consider the alleged conversation

between Mr. Hooker and executor Pardy, in which it is said that Hooker told him to take the patent. [Tr. p. 24, Q. 9 *et seq.*, p. 32, Q. 3 *et seq.*]

Mr. Hooker denies that any such conversation took place. [Tr. p. 147, 148, 153, 154.] Pardy says: [Q. 13, p. 25.] "In the controversy arising I stated to Mr. "Hooker that there was two ways of settlement with the "estate; either to pay a fair and proper compensation to "it for the riveting machine spoken of, or to allow the "estate to take out a patent of it. He replied, 'you can "take out the patent.'"

"Q. State how you happened to have this conversa-"tion with Mr. Hooker? A. From George Pardy, while "living, and from certain letters in the possession of the "estate, written to him by J. D. Hooker, *I understood* "that the question of the future possession and control of "the riveting machine was unsettled, and wishing to de-"termine the matter I made the proposition that he should "control it for a fair monied compensation, or the estate "should be allowed to take out the patent upon the ma-"chine without his opposition."

Defendant's counsel duly objected to the witness's statement of his conclusion from what his brother had said to him and from the letters. Clearly this objection was well taken. No self-serving declaration of George Pardy would be admissible; and, *a fortiori,* William Pardy's interpretation of George's declarations—if George ever made any such, which we do not believe—was incompetent on any theory. But, no doubt counsel thought George Pardy's statements relevant. *Why, then, are we not given the alleged conversations between George and William, instead of William's conclusion from them?* If George Pardy had ever told William that

he, George, was the inventor of the machine, William would surely have testified to that fact. Neither Osborne, the patent solicitor and friend of George, nor Mr. Rix, of Fourth and Rix, the builders of the machine [Tr. p. 127, Q. 168] nor William Pardy his brother, nor William S. Pardy his nephew, nor Miss Hassler testified that George ever stated to them that he and not Hooker was the inventor of this machine. Nor does George claim it in the letter to his New South Wales friend. We submit that it is not in reason to suppose that if George Pardy claimed the invention as his, he would never have said so to either of these relatives or friends (especially if there was any controversy pending about it); and it is very certain that if he had made such a statement to any of them, the fact would have been testified to. Hooker's testimony [Tr. p. 115, 117] is in perfect harmony with the proven facts, and manifestly true. At pages 115, 116, he says that George Pardy asked him to take out a patent, which he declined to do at that time. Then he testifies: Q. 108 and A. "He said that he could "take out the patent in his name if I wanted. I said, " 'How can you do that?' 'Well,' he says, "If you don't " 'object there is nobody to stand in the way of it. I can " 'take out the patent in my name and assign it over to " 'you and I make my fee.' I told him we would see "about it later. He never claimed the patent to the "machine that I know of; never pretended to to me. Q. "By that you mean he never claimed to be the inventor "of the machine? A. Never. So far as I know." It was natural enough, after this conversation, that Pardy

abandoned the specifications he had commenced in his own name.

Now if Hooker did not let Pardy himself take out a patent; if Pardy never claimed the right to; is it reasonable to suppose that upon the first *and only* pretended challenge from the executor he would tell him to take one out? The court will remember that executor Pardy admits, that never, before or after this alleged conversation, did he say or write a word to Hooker upon the subject. Sight must not be lost of the fact that the executor Pardy and Miss Hassler are beneficiaries under George Pardy's will.

Again, as to the alleged alternative suggested, that Hooker should pay a monied compensation. There was nothing in that to appeal to Hooker. On his cross-examination, he says [Tr. p. 123]: Q. 136. "What agree-"ment did you have with Mr. Pardy in relation to the "payment for his services in the matter? A. Simply I "would pay him his charges for the time he was em-"ployed. Q. 137. Did he ever render you any bill for "the time that he was employed in the matter? A. No. "Q. 138. Did you ever pay him anything for the time? "Yes, sir; overpaid him." All of Mr. Hooker's accounts, vouchers and memoranda pertaining to this transaction were destroyed by fire. Some of his payments to Pardy were made by check enclosed in letters, of which some were produced by the complainants. [Tr. p. 138, 140, 141.] These letters show payments to Pardy of $1122.50, partly to meet the bills of Rix & Furth, who were making the machine. Complainants' exhibit 7 [Tr. p. 69] shows the total amount of their charges to be $961.35, leaving

a balance of $161.15 in Mr. Pardy's hands. Other sums were paid to him by Mr. Hooker personally. How much Mr. Hooker frankly admitted he could not recall. [Tr. 123, 124.] Now it must be borne in mind, that the service performed by Pardy was simply making the drawings for the builders and visiting the machine shop, from time to time, for a few minutes a day during the construction of the machine [Tr. 124] for a period of three months. The fact that Pardy never made any demand on Hooker for any further payments, during the year and eight months after he sent the machine to Los Angeles, is the strongest kind of evidence that he had been fully paid. So, we say, there was no reason whatever, why Hooker should recognize any demand by executor Pardy for a "monied compensation." We do not need to charge William Pardy and Miss Hassler with deliberate perjury as to this alleged interview; but can content ourselves with suggesting that eighteen years after the date named they have naturally hunted "hastily through the "pigeon-holes of memory where unpleasant or damag- "ing truths are supposed to be stored away" [complainants' brief, p. 13]; and, the wish being father to the thought, persuaded themselves to recall this strange and unnatural conversation.

POINT V.

The judgment and decree of the learned Circuit Court should be affirmed.

George Pardy was for forty years a friend of John D. Hooker, whom, the record shows, Mr. Hooker had constantly befriended, and was befriending at the time of the transaction which is involved in this suit. The court is asked to find, upon the testimony of witnesses given eighteen years after the events of which they swear, and the principal one of whom was an enemy to Mr. Hooker and his machine and discharged for leading a strike in Mr. Hooker's factory at the very time he pretends to have been aiding Pardy to perfect the machine; and all of whom are contradicted by letters written as a part of the *res gestae*, and by the inherent nature of the case; that John D. Hooker has committed deliberate perjury, to protect himself in robbing the estate of his old friend. The learned judge at circuit, after argument and re-argument of the case found no ground for such decision. We submit that he was clearly right.

Respectfully submitted,

J. W. McKinley,

Solicitor for Appellee.

J. W. McKinley and
Alexander H. Van Cott,

Of Counsel.

NO. 1322

IN THE

UNITED STATES
Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

William Pardy and A. Hasler,
Appellants,

vs.

J. D. Hooker Co.,
Appellee.

FILED
NOV 14 1906

PETITION FOR REHEARING.

G. E. HARPHAM,
Solicitor for Appellants.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

IN THE

UNITED STATES

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William Pardy and A. Hasler,
Appellants,

vs.

J. D. Hooker Co.,
Appellee.

PETITION FOR REHEARING.

Now come the appellants herein and petition the court to grant a rehearing in this action on the ground that this court erred in deciding that complainants suit could not be maintained because of the agreement between Hooker and George Pardy as set out in the opinion.

In the opinion of the court filed October 29th, 1906, this court found that the court below erred in adjudging the patent sued on to be void and in deciding that George Pardy was not the inventor of the machine patented, holding that the evidence did show that George Pardy was the inventor of the machine. The court also says in its opinion "It also clearly appears both from the oral testimony and from the letters in evidence, that the dis-

tinct agreement between Hooker and George Pardy was that Hooker was to pay all the costs of the work and pay Pardy for his services and was to own and control any patent that should be issued covering the machine." The court also says, "We are of the opinion that such suit cannot be sustained in view of the distinct agreement between Hooker and the deceased Pardy above alluded to, to say nothing of the appellants' laches."

It is to these last matters that the appellants feel aggrieved and think that the court erred in so deciding. and that the reason the court so erred was because the court overlooked some of the testimony.

This suit being a suit in equity, and this court having found that George Pardy was the inventor of the Riveting Machine described in the letters patent and that the patent was rightfully taken out by the executor of his estate it was incumbent for the defendant to show that the title to the patent equitably belonged to J. D. Hooker before it could defeat the action.

We desire to call the court's attention to the fact that the answer *does not set up any equitable ownership to the patent sued on,* but bases the defense upon the ground that George Pardy was not the inventor of the patented improvement and that J. D. Hooker was.

This court having found that such contention was not true, awards the decision to the defendant upon the ground that equitably the title to the patent sued on was in J. D. Hooker and that therefore appellants could not maintain the action.

We desire particularly to call the court's attention to the letter of J. D. Hooker of date Feby. 17th, 1888,

(Exhibit 18, p. 183) from which we quote: "Again as to the machines I understand I am to own and control the patent upon them, paying you a fair and reasonable sum for all your time and labor and what will be just and fair between us."

Also to the letter of Hooker to Pardy of date July 20 1888, (Ex. 26, p. 190) from which we quote: "I don't want to sell these machines. Can make more out of the work. I want to own the whole business, *paying you fairly and squarely what would be right.*" Also to the letter of Hooker to Pardy of date May 6, 1889, (Ex. 27, p. 191) from which we quote: *"I propose to do the square thing with you.* I do not think you ever knew me to do otherwise. I shall be in S. F. shortly when I will see you. *You have not paid out any of your money for me.* I will make it plain to you."

Here then we find a statement of what Mr. Hooker's understanding in relation to the matter was at the time. There is nothing to show what George Pardy's understanding was, but assuming that he agreed with Mr. Hooker and that his understanding of the matter was the same as Mr. Hooker's, then before Mr. Hooker was legally or equitably entitled to the title of the patent on the machine, he was required to pay George Pardy "a *fair* and *reasonable* sum for all his time and labor and what will be *just* and *fair.*" Now can this court say that the testimony of Hooker or any other testimony in the case shows that Hooker ever did this? There is no testimony that he ever paid anything whatever. It is true that Hooker says that he overpaid Pardy for his time, but we call attention to the following testimony:

"Q. 139 (p. 123). Overpaid him. How much did you pay him? A. Well, I would be in his office and he would say he was short of money, he hadn't got money to pay his room rent, and I asked him how much would satisfy him, and he would say so much, and I would give it to him. I kept no tally of this.

"Q. 140. You kept no tally of it? A. No, sir.

"Q. 141. You took no receipts for it? A. No, sir. He never made any other demands for money on me except in that way."

At this very time George Pardy had a balance in bank.

Does this testimony satisfy a chancellor that Mr. Hooker had paid Pardy in accordance with the understanding upon which he, Hooker, was to own the patent on the machines, particularly in the face of the letter of May 6, 1889, exhibit 27, p. 191, from which it is clearly apparent that, not only had Pardy not been paid for his time, but claimed that he had not been paid the money which he had expended on the machines. In this letter he writes Pardy in answer to Pardy's letter of May 2nd: *"I propose to do the square thing with you. You have not paid out any of your money for me."* George Pardy died the following August. We also have the testimony of William Pardy, see p. 28, that he learned from his brother before his death that the question of the future control of the patent riveting machine was an open question between Mr. Hooker and George Pardy at the time of the death of George Pardy, and when the executor spoke to Hooker about taking out the patent Hooker said for the estate to take out the patent. The letters from which we have quoted certainly show that no settlement had been made at their respective dates, and no testimony was introduced showing a settlement

later, nor does Hooker even claim that he made any settlement with Pardy that entitled him to have the patent assigned to him. Upon what principle of equity can this court say that Hooker is entitled to the title of the patent without showing that he has complied with the conditions of the understanding upon which that title was to be owned by him?

If the title to the patent was legally in the claimants, and this court has found that it was, complainants were legally entitled to recover, unless the court can say from the evidence that Hooker has shown that he paid George Pardy a *fair* and *reasonable* sum for *all his time and labor upon the machine,* and in addition thereto *what would be just and fair between them,* for upon *that understanding* and *that alone* was the title to the patent on the machine to be transferred to Hooker. We have carefully searched the testimony and we cannot find one scintilla of evidence that Hooker ever paid Pardy any sum for the transfer of the patent rights on the machine to Hooker. Without such payment the equitable as well as the legal title to the patent was in the complainants and they were entitled to recover.

As the answer did not set up the question of laches on the part of complainants, no testimony was taken with reference thereto. We could have shown if necessary repeated demands upon Mr. Hooker from time to time for a settlement of these matters and could have shown that complainants were not able to get counsel skilled in patent matters to take up their cause before this action was brought. But aside from this question is a court of equity now going to permit the defendant,

Hooker, to take advantage of his own wrong? Is this court going to say that because action was not instituted as soon as the infringing machine was built, or within six years thereafter, that no relief can be had from a party who knew that he was wrongfully building the machine and using it? As to the right to obtain an injunction restraining the defendant from the further use of the machine, built after George Pardy's death, we say that the doctrine of laches cannot apply, because laches cannot transfer a right vested by law in one party to another. By the law, when the patent issued to complainant the exclusive right to make, to use, and to sell machines containing the patented improvement vested in them, except so far as that right had been alienated by George Pardy, the inventor. The extent of this alienation is shown by the testimony to be for two machines, and as to those two machines complainants are not suing or claiming any rights. They only claim a right of action as to the machine that was made after George Pardy's death.

We, therefore, respectfully request that the court grant us a re-hearing and direct the court below to render judgment for the complainants as prayed for in the bill of complaint.

G. E. Harpham,
Solicitor for Appellants.

No. 1323

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

FIRST NATIONAL BANK OF COUNCIL BLUFFS, IOWA,

Plaintiff in Error,

vs.

J. A. MOORE,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Northern Division.

FILED
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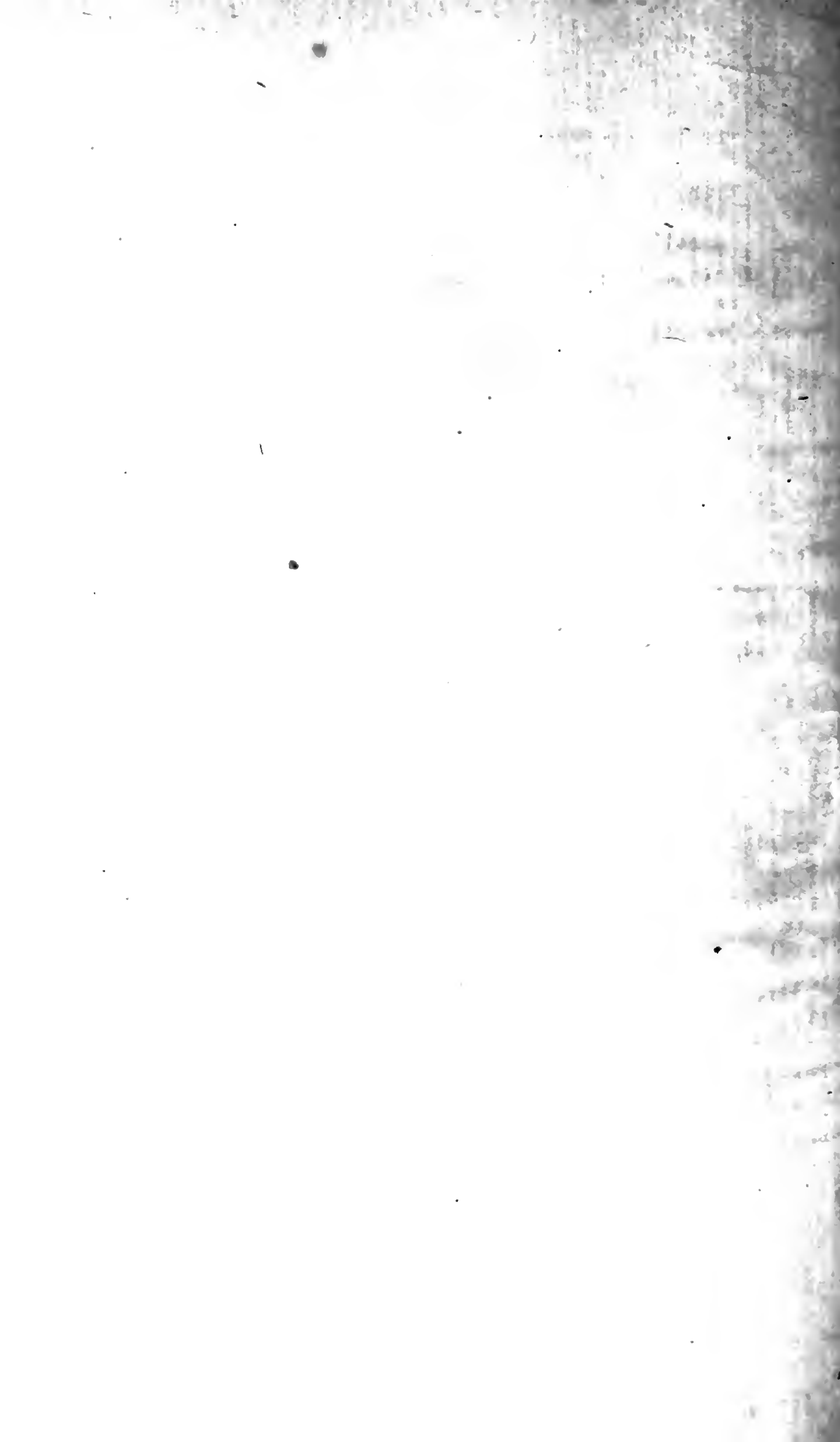

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In the Circuit Court of the United States, in and for the Western District of Washington.

FIRST NATIONAL BANK OF COUNCIL BLUFFS, IOWA, Plaintiff,		
vs.	}	No. 1128.
J. A. MOORE, Defendant.		

Amended Complaint.

Plaintiff complains and alleges, for a first cause of action:

I.

That the plaintiff now is and was at all the times hereinafter mentioned, a banking association duly organized, created and existing under and by virtue of the banking laws of the United States of America, having its office and place of business at Council Bluffs, in the State of Iowa, and is and was at all times hereinafter mentioned a citizen and inhabitant of the State of Iowa.

II.

That the Citizens' State Bank of Council Bluffs, Iowa, was, at the dates hereinafter mentioned, a corporation duly organized, created and existing under and by virtue of the laws of the State of Iowa, having its office and place of business in the State of Iowa, and was at all times hereinafter mentioned a citizen and inhabitant of the State of Iowa.

III.

That the defendant, J. A. Moore, is now a citizen and resident of the State of Washington.

IV.

That at Council Bluffs, Iowa, on the 2d day of January, 1897, the defendant, J. A. Moore, for value received, made, executed and delivered to the Citizens' State Bank of Council Bluffs, Iowa, his certain promissory note, in writing, in words and figures following:

"$2500. Council Bluffs, Iowa, Jan. 2, 1897.

Six months after date, for value received, I, as principal, promise to pay to the order of the Citizens' State Bank of Council Bluffs, Iowa twenty-five hundred dollars at its office, with interest, payable semi-annually, at eight per cent per annum after date.

And if interest be not paid when due, it shall become as principal, and draw interest at the rate of eight per cent per annum, payable semi-annually. This note is payable in gold coin of the United States of America equal to the present standard of value. The makers and endorsers hereof each hereby waive presentation for payment, notice of nonpayment and protest of this note, and due diligence in bringing suit against any party thereto and sureties' consent that time of payment may be extended without notice thereof. I also agree to pay all reasonable expenses, including commissions incurred in collecting this note, and a reasonable attorney's fee, in addition, in case suit is brought thereon, the same to be taxed as costs of suit and in case of

judgment to be entered as a part of the same. It is hereby agreed that any Justice of the Peace may have jurisdiction of any suit commenced for the collection of this note, not to exceed three hundred dollars.

(Signed) J. A. MOORE."

V.

That after the maturity of said note and on or about the 31st day of December, 1899, the said Citizens' State Bank of Council Bluffs, Iowa, for value received, sold, assigned, transferred and delivered the said note to plaintiff, and the said plaintiff has ever since been and now is the owner and holder thereof and in possession thereof, and afterward, on or about the 2d day of January, 1902, in order to transfer to plaintiff the legal title to said note, said Citizens' State Bank of Council Bluffs, Iowa, made, executed and delivered to plaintiff an assignment thereof in writing, in the words and figures following, to wit:

"Council Bluffs, Iowa, Jany. 2nd, 1902.

For value received, we hereby assign to the First National Bank of Council Bluffs, Iowa, our successors, notes for $2,500.00, $2,500.00 and $800.00, signed by J. A. Moore to us, dated January 2nd, 1897, and due six months after date.

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T."

—and plaintiff thereupon became and ever since has been and now is the legal as well as the equitable holder of said note.

VI.

That no part of the sum of money mentioned in said promissory note has been paid, and the whole thereof is now due and owing.

VII.

That the defendant, J. A. Moore, at the time when said note matured and became due was not a resident of the State of Washington, nor of the State of Iowa, or an inhabitant therein, or to be found therein, and that since the maturity of said note and less than six years prior to September 21, 1903, the said defendant, J. A. Moore, came into and moved to and became a resident of the State of Washington, and has been a resident to the State of Washington for less than six years prior to the commencement of this action.

VIII.

That after the making of said note, the said defendant, J. A. Moore, prior to the 2d day of July, 1903, by writing signed by him, acknowledged the indebtedness of said note and obligation thereof, and offered and promised to pay the same.

IX.

That the sum of four hundred dollars ($400.00), is a reasonable attorney's fee to be allowed the plaintiff in this action, upon this cause of action.

Plaintiff complains and alleges for a second cause of action:

I.

That the plaintiff is now and was at all times hereinafter mentioned a banking association duly organized

created and existing under and by virtue of the banking laws of the United States of America having its office and place of business at Council Bluffs, in the State of Iowa, and is and was at all times hereinafter mentioned, a citizen and inhabitant of the State of Iowa.

II.

That the Citizens' State Bank of Council Bluffs, Iowa, was, at the dates hereinafter mentioned, a corporation, duly organized, created and existing under and by virtue of the laws of the State of Iowa, having its office and place of business in the State of Iowa, and was at all times hereinafter mentioned, a citizen and inhabitant of the State of Iowa.

III.

That the defendant, J. A. Moore, is now a citizen and resident of the State of Washington.

IV.

That at Council Bluffs, Iowa, on the 2d day of January, 1897 the defendant, J. A. Moore, for value received, made executed and delivered to the Citizens' State Bank of Council, Iowa, his certain promissory note, in writing, in words and figures following:

"$2,500. Council Bluffs, Iowa, Jan. 2, 1897.

Six months after date, for value received, I, as principal, promise to pay to the order of the Citizens' State Bank of Council Bluffs, Iowa, twenty-five hundred dollars, at its office, with interest, payable semi-annually, at eight per cent per annum after date.

And if interest be not paid when due, it shall become as principal, and draw interest at the rate of eight per cent per annum, payable semi-annually. This note is payable in gold coin of the United States of America, equal to the present standard of value. The makers and endorsers hereof each hereby waive presentation for payment, notice of nonpayment and protest of this note, and due diligence in bringing suit against any party thereto and sureties' consent that time of payment may be extended without notice thereof. I also agree to pay all reasonable expenses, including commissions incurred in collecting this note, and a reasonable attorney's fee in addition, in case suit is brought hereon, the same to be taxed as costs of suit, and in case of judgment to be entered as a part of the same. It is hereby agreed that any Justice of the peace may have jurisdiction of any suit commenced for the collection of this note, not to exceed three hundred dollars.

(Signed) J. A. MOORE."

V.

That after the maturity of said note, and on or about the 31st day of December, 1899, the said Citizens' State Bank of Council Bluffs, Iowa, for value received, sold, assigned, transferred and delivered the said note to plaintiff, and the said plaintiff has ever since been and now is the owner and holder thereof and in possession thereof, and afterward, on or about the 2d day of January, 1902, in order to transfer to plaintiff the legal title to said note, the said Citizens' State Bank of Council Bluffs, Iowa, made executed and delivered to plaintiff

an assignment thereof, in writing, in the words and figures following, to wit:

"Council Bluffs, Iowa, Jany. 2d, 1902.

For value received we hereby assign to the First National Bank of Council Bluffs, Iowa, our successors, notes for $2,500.00, $2,500.00 and $800.00, signed by J. A. Moore to us, dated January 2nd, 1897, and due six months after date.

CITIZENS' STATE BANK.
By CHARLES R. HANNAN, Cas.
T."

—and plaintiff thereupon became and ever since has been and now is the legal as well as the equitable holder of said note.

VI.

That no part of the sum of money mentioned in said promissory note has been paid, and the whole thereof is now due and owing.

VII.

That the defendant, J. A. Moore, at the time when said note matured and became due was not a resident of the State of Washington, nor the State of Iowa, or an inhabitant therein, or to be found therein, and that since the maturity of said note and less than six years prior to September 21, 1903, the said defendant, J. A. Moore, came into and moved to and became a resident of the State of Washington, and has been a resident of the State of Washington for less than six years prior to the commencement of this action.

VIII.

That after the making of said note, the said defendant, J. A. Moore, prior to the 2d day of July 1903, by writing signed by him, acknowledged the indebtedness of said note and the obligation thereof, and offered and promised to pay the same.

IX.

That the sum of four hundred dollars ($400.00), is a reasonable attorney's fee to be allowed the plaintiff in this action, upon this cause of action.

Plaintiff complains and alleges for a third cause of action:

I.

That the plaintiff is now and was, at all times hereinafter mentioned, a banking association, duly organized, created and existing under and by virtue of the banking laws of the United States of America, having its office and place of business at Council Bluffs, Iowa, and is and was at all times hereinafter mentioned, a citizen and inhabitant of the State of Iowa.

II.

That the Citizens' State Bank of Council Bluffs, Iowa, was, at the dates hereinafter mentioned, a corporation duly organized, created and existing under and by virtue of the laws of the State of Iowa, having its office and place of business in the State of Iowa, and was at all times hereinafter mentioned a citizen and inhabitant of the State of Iowa.

III.

That defendant, J. A. Moore, is now a citizen and resident of the State of Washington.

IV.

That at Council Bluffs, Iowa, on the 2d day of January, 1897, the defendant, J. A. Moore, for value received, made, executed and delivered to the Citizens State Bank of Council Bluffs, Iowa, his certain promissory note, in writing, in words and figures following:

"800. Council Bluffs, Iowa, Jan. 2, 1897.

Six months after date, for value received, I, as principal, promise to pay to the order of the Citizens' State Bank of Council Bluffs, Iowa, eight hundred dollars, at its office, with interest, payable semi-annually, at eight per cent per annum after date.

And if interest be not paid when due, it shall become as principal, and draw interest at the rate of eight per cent per annum, payable semi-annually. This note is payable in gold coin of the United States of America equal to the present standard of value. The makers and endorsers hereof each hereby waive presentation for payment, notice of nonpayment and protest of this note and due diligence in bringing suit against any party thereto and sureties' consent that time of payment may be extended without notice thereof. I also agree to pay all reasonable expenses, including commissions incurred in collecting this note, and a reasonable attorney's fee in addition, in case suit is brought thereon, the same to be taxed as costs of suit, and in case of judg-

ment to be entered as a part of the same. It is hereby agreed that any Justice of the Peace may have jurisdiction of any suit commenced for the collection of this note, not to exceed three hundred dollars.

(Signed) J. A. MOORE."

V.

That after the maturity of said note and on or about the 31st day of December 1899, the said Citizens' State Bank of Council Bluffs, Iowa, for value received, sold, assigned, transferred and delivered the said note to plaintiff, and said plaintiff has ever since been and now is the owner and holder thereof and in possession thereof, and afterward, on or about the 2d day of January, 1902, in order to transfer to plaintiff the legal title to said note, the said Citizens' State Bank of Council Bluffs, Iowa, made, executed and delivered to plaintiff an assignment thereof, in writing, in the words and figures following, to wit:

"Council Bluffs, Iowa, Jany. 2d, 1902.

For value received, we hereby assign to the First National Bank of Council Bluffs, Iowa, our successors, notes for $2,500.00, $2,500.00 and $800.00, signed by J. A. Moore to us, dated January 2nd, 1897, and due six months after date.

CITIZENS' STATE BANK.
By CHARLES R. HANNAN, Cas.
T."

—and plaintiff thereupon became and ever since has been and now is the legal as well as the equitable holder of said note.

VI.

That no part of the sum of money mentioned in said promissory note has been paid, and the whole thereof is now due and owing.

VII.

That the defendant, J. A. Moore, at the time when said note matured and became due, was not a resident of the State of Washington, nor of the State of Iowa, or an inhabitant therein, or to be found therein, and that since the maturity of said note and less than six years prior to September 21, 1903, the defendant, J. A. Moore, came into and moved to and became a resident of the State of Washington, and has been a resident of the State of Washington for less than six years prior to the commencement of this action.

VIII.

That after the making of said note, the said defendant, J. A. Moore, prior to the 2d day of July, 1903, by writing, signed by him, acknowledged the indebtedness of said note and the obligation thereof, and offered and promised to pay the same.

IX.

That the sum of two hundred dollars ($200.00) is a reasonable attorney's fee to be allowed the plaintiff in this action, upon this cause of action.

Wherefore, plaintiff demands judgment against the defendant for the sum of five thousand eight hundred dollars ($5,800.00), with interest at the rate of eight per cent per annum from January 2, 1897, to be com-

pounded, and one thousand dollars ($1,000.00) attorneys' fees and plaintiff's costs and disbursements in this action.

JAMES KIEFER and
JAMES McNENY,
Attorneys for Plaintiff.

State of Washington,
County of King,—ss.

James Kiefer, being first duly sworn, according to law, deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true; that he makes this verification for and on behalf of the plaintiff for the reason that the plaintiff is not a resident of the State of Washington and that this action is brought upon written instruments for the payment of money only, which instruments of writing are in the possession of affiant.

JAMES KIEFER.

Subscribed and sworn to before me on this 17 day of August, 1905.

[Notary Public—Seal] JAMES H. KANE.
Notary Public in and for the State of Washington, Residing at Seattle.

Service of all papers in this cause may be made on the undersigned at 527 Colman Building, Seattle, Wash.

JAMES KIEFER.

Copy of within amended complaint received and service of same acknowledged this 17th day of August, 1905.

GEO. M. McKAY,
Atty. of Deft.

[Endorsed]: Amended Complaint. Filed in the U. S. Circuit Court, Western Dist. of Washington. Aug. 21, 1905. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

In the Circuit Court of the United States, in and for the Western District of Washington.

FIRST NATIONAL BANK OF COUNCIL BLUFFS, IOWA,
Plaintiff,
vs.
J. A. MOORE,
Defendant.

No. 1128.

Stipulation as to Pleadings.

It is hereby stipulated that the answer of the defendant, verified December 10, 1903, to the original complaint shall be taken and deemed to be the answer of the defendant to the amended complaint herein, and that the reply of the plaintiff to said answer, verified December 14, 1903, shall be amended if plaintiff elect.

JAMES KIEFER and
JAMES McNENY,
Attorneys for Plaintiff.

GEORGE McKAY,
Attorneys for Defendant.

[Endorsed]: Stipulation. Filed in the U. S. Circuit Court, Western Dist. of Washington. Mar. 30, 1906. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

In the Circuit Court of the United States for the District of Washington, Northern Division.

FIRST NATIONAL BANK OF COUNCIL BLUFFS, IOWA,
Plaintiff,
vs.
J. A. MOORE,
Defendant.
No. 1128.

Defendant's Answer.

For answers to the allegations made in the three several causes of action set forth in the plaintiff's complaint, the defendant

I.

Denies all knowledge or information sufficient to form a belief as to the allegations made in paragraph I of each of the said several causes of action.

II.

Admits the allegation made in paragraph II of each of the said several causes of action.

III.

Admits the allegations made in paragraph III of each of the said several causes of action.

IV.

Admits that he signed and delivered the several notes

set forth in paragraph IV of the said several causes of action, but he denies all the other allegations of paragraph IV of said several causes of action and in particular he denies that said several notes, or either of them were given for value received.

V.

Denies all knowledge sufficient to form a belief as to the allegations made in paragraph V of each of said several causes of action.

VI.

Admits, as alleged in paragraph VI of each of said several causes of action, that he has paid nothing on either of said notes, but denies that there is anything due on either of said notes.

VII.

Admits that he was not, at the time when the said several notes matured, a resident of the State of Iowa or an inhabitant therein or to be found therein, but he denies each and every allegation made in paragraph VII of said several causes of action, and in particular he alleges that for more than six years prior to the commencement of this action he was a resident of the State of Washington and domiciled therein.

VIII.

Denies each and every allegation made in paragraph VIII of said several causes of action.

IX.

Denies each and every allegation made in paragraph IX of said several causes of action.

First Affirmative Defense.

For a first affirmative defense to the several causes of action set forth in the plaintiff's complaint the defendant

I.

Alleges that the several notes mentioned in the several causes of action set forth in the plaintiff's complaint were not nor was either of them, at the time this action was commenced, the property of the plaintiff in this action, and that said notes are not now the property of the plaintiff on this action.

Second Affirmative Defense.

For a second affirmative defense to the several causes of action set forth in the plaintiff's complaint the defendant

I.

Alleges that the several causes of action mentioned in the plaintiff's complaint did not accrue, nor did either of said several causes of action accrue, within six years prior to the commencement of this action.

Third Affirmative Defense.

For a third affirmative defense to the several causes of action set forth in the plaintiff's complaint the defendant

I.

Alleges that George J. Crane and F. P. Bellinger are now and at all times mentioned in this suit were copartners in the business of promoting the sale of the pretended secret formula hereinafter mentioned and

that the said copartners are the owners and holders of the several notes mentioned in the plaintiff's amended complaint and of all pecuniary interest therein and were such owners before and at the time this suit was commenced.

II.

Alleges that the several notes mentioned in the several causes of action set forth in the plaintiff's amended complaint were signed by the defendant in substitution of and for a note for $5,000, given by the defendant to the said Crane and Bellinger on the —— day of March, 1893, and without waiving any defenses whatever which this defendant had or held to the note for $5,000, and that the sole and only consideration for the said last-mentioned note was the warranty, contract and agreement of the said Crane and Bellinger hereinafter set forth.

III.

Alleges that on the —— day of March, 1893, the said Crane and Bellinger warranted to the defendant and contracted and agreed with him that the said Bellinger was the author and discoverer of a secret remedy, formula, recipe or prescription for the cure of the morphine, cocaine, opium, chloral, liquor tobacco and other drug habits and the diseases and infirmities caused by the habitual use of such drugs and that said remedy, formula, recipe or prescription was a certain cure and a specific for said habits and diseases and that they, the said Crane and Bellinger, were then the owners of the said secret remedy, formula, recipe or prescription and

that they, the said Crane and Bellinger, would organize or procure to be organized a corporation, under the laws of the State of Washington, and would transfer to said corporation said remedy, formula, recipe or prescip- tion in payment for the capital stock of said corporation and would transfer to the defendant one-fifth of said capital stock.

IV.

That on the 15th day of March, 1893, the said Crane and Bellinger procured to be organized the said corpora- tion under the laws of the State of Washington.

V.

Alleges that in consideration of the said agreement the defendant gave the said original note; that the said Crane and Bellinger did not keep or perform their said warranty and contract; that neither of them had dis- covered or knew any secret or other remedy, formula, recipe or prescription for the cure of the said habits and diseases and could not and did not transfer any such remedy, formula, recipe or prescription to the said cor- poration and the stock of the said corporation was never of any value whatever.

VI.

Alleges that to induce the defendant to sign the notes sued upon in this action in substitution of and for the said note for $5,000, the Citizens' State Bank of Coun- cil Bluffs, Iowa, the payee in said notes, falsely repre- sented to the defendant that it had taken said original note for $5,000 in the ordinary course of business be- fore maturity and had paid value therefor and without

notice of any defense thereto; that in reliance on said representations and believing them to be true the defendant signed the notes sued upon in this action; that said representations were wholly false and untrue; that said plaintiff was not a bona fide holder of said original note for $5,000; that it took said note after maturity without paying any value therefor and with notice that said note was given without any consideration therefor, and was obtained by the fraud of the said Crane and Bellinger.

Fourth Affirmative Defense.

For a fourth affirmative defense to the several causes of action set forth in the plaintiff's complaint the defendant

I.

Alleges that George J. Crane and F. P. Bellinger are now and at all times mentioned in this suit were copartners in the business of promoting the sale of the pretended secret formula hereinafter mentioned and that the said copartners are the owners and holders of the several notes mentioned in the plaintiff's amended complaint and of all pecuniary interest therein and were such owners before and at the time this suit was commenced.

II.

Alleges that the several notes mentioned in the several causes of action set forth in the plaintiff's amended complaint were signed by the defendant in substitution of and for a note for $5,000 given by the defendant to the said Crane and Bellinger on the —— day of March,

1893, and without waiving any defenses whatever which this defendant had or held to the note for $5,000, and that the said last-mentioned note was obtained by the said Crane and Bellinger by the fraudulent devices, representations and pretenses hereinafter mentioned.

III.

That the sole and only consideration for the said original note for $5,000 and several notes sued upon in this action was the agreement by and between the defendant and the said Crane and Bellinger that they, the said Crane and Bellinger, would organize a corporation under the laws of the State of Washington and transfer to said corporation, in payment for its capital stock, a secret remedy, formula, recipe or prescription for the cure of the morphine, cocaine, chloral, opium, liquor, tobacco and other drug habits and the diseases and infirmities caused by the habitual use of such drugs and to transfer to the defendant one-fifth of the capital stock of the said corporation.

IV.

That with intent to cheat and defraud the defendant and to induce him to execute and deliver the said original note for $5,000, the said Crane and Bellinger falsely and fraudulently represented and pretended to the defendant that the said Bellinger was the discoverer of and author of and in possession of the said secret remedy, formula, recipe or prescription and that the said was a secret and known only to the said Bellinger, and that the same was a sure and certain cure and a specific

for the said habits and diseases, and that they intended to deliver the said secret formula to the said corporation; that the said Crane and Bellinger, on the 15th day of March, 1893, procured a corporation to be organized, under the laws of the State of Washington, and then represented and pretended that they had transferred and assigned to the said corporation the said remedy, formula, recipe or prescription in payment for the entire capital stock of said corporation; that relying on the said representations and believing them to be true the defendant gave to the said Crane and Bellinger the said original note for $5,000; that the said representations and pretenses of the said Crane and Bellinger were and are wholly falsely and untrue and were known to be so by the said Crane and Bellinger when made; that the said Crane and Bellinger had not nor had either of them any secret or other remedy, formula, recipe or prescription for the cure of the said habits and diseases or either or any of the said habits and diseases, and they had not nor had either of them any intention to deliver to the said corporation any secret or other remedy, formula, recipe or prescription for the cure of any or either of the said diseases or habits, and they, the said Crane and Bellinger, did not nor did either of them give to the said corporation or its officers any information of the contents of any remedy, formula, recipe or prescription for the cure of the said habits and diseases or either of them and the said stock of the said corporation is and was wholly worthless and of no value whatsoever and was known to be so by the said Crane and Bellinger.

V.

That the defendant did not discover the fraud of the said Crane and Bellinger until on or about the 15th day of December, 1902.

VI.

Alleges that to induce the defendant to sign the notes sued upon in this action in substitution for the said note for $5,000, the Citizens' State Bank of Council Bluffs, Iowa, the payee in said notes, falsely represented to the defendant that it had taken the said original note for $5,000 in the ordinary course of business before maturity and had paid value therefor and without notice of any defense thereto; that in reliance on said representations and believing them to be true the defendant signed the notes sued upon in this action; that said representations were wholly false and untrue; that said plaintiff was not a bona fide holder of said original note for $5,000; that it took said note after maturity without paying any value therefor and with notice that said note was given without any consideration therefor and was obtained by the fraud of the said Crane and Bellinger.

Wherefore the defendant prays judgment as follows:

1. That the plaintiff's complaint be dismissed.

2. That the defendant recover his costs and disbursements, to be taxed.

GEO. McKAY,

Attorney for Defendant, 419-421 Arcade Building, Seattle, Washington.

State of Washington,
County of King,—ss.

J. A. Moore, being duly sworn, says: That he is the defendant named in the foregoing answer; that he has read the same, knows the contents thereof and believes the same to be true.

J. A. MOORE.

Subscribed and sworn to before me this 10 day of December, 1903.

ROBERT A. TRIPPLE,
Notary Public for the State of Washington, Residing at Seattle.

Receipt and a copy of due service hereof admitted this 10th day of December, 1903.

JAMES KIEFER,
Attorney for Plaintiff.

[Endorsed]: Answer. Filed in the U. S. Circuit Court, Dist. of Washington. Jul. 26, 1904. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

In the Circuit Court of the United States, in and for the Western District of Washington.

FIRST NATIONAL BANK OF COUNCIL BLUFFS, IOWA,
Plaintiff,
vs.
JAMES A. MOORE,
Defendant.

No. 1128.

Plaintiff's Amended Reply.

Comes now the plaintiff and for reply to the affirmative matters pleaded in the defendant's answer herein, says and alleges:

I.

The plaintiff denies each and every allegation contained in the first and second affirmative defenses pleaded in said answer.

II.

The plaintiff denies each and every allegation contained in the 1st, 2d, 3d, 4th, 5th and 6th paragraphs of the third affirmative defense, except that the plaintiff admits that the notes sued upon in the plaintiff's amended complaint were signed by the defendant in renewal of a note for $5,000.00 given by defendant to George J. Crane in March, 1893.

III.

The plaintiff also admits that it was agreed between George J. Crane and F. B. Bellinger and the defendant that a corporation should be organized under the laws

of the State of Washington, for the exploitation of a certain cure for morphine, cocaine, opium, chloral, liquor, tobacco and other habits, and that such corporation was organized.

IV.

The plaintiff denies each and every allegation contained in the first, second, third, fourth, fifth and sixth paragraphs of the fourth affirmative defense pleaded in said answer, except that the plaintiff admits that the notes sued upon in the plaintiff's amended complaint were signed by the defendant in renewal of a note for $5,000.00 given by the defendant to George J. Crane in March, 1893.

V.

And by way of new matter and for a further reply to said affirmative defenses, plaintiff says and alleges that the defendant is estopped from denying the title of the plaintiff to the notes herein sued upon, for the reason that the defendant has ever since the plaintiff has been the owner of said notes dealt with the plaintiff as the owner of said notes and has requested and obtained from the plaintiff extensions of time for the payment of said notes and the plaintiff has granted extension from time to time.

Wherefore, having fully replied plaintiff demands judgment as in its complaint prayed.

JAMES KIEFER,
JAMES McNENY,
Attorneys for Plaintiff.

State of Washington,
County of King,—ss.

James Kiefer, being first duly sworn according to law, deposes and says, that he is the attorney for the plaintiff above named; that he has read the foregoing reply, knows the contents thereof and believes the same to be true; that he makes this verification on behalf of the plaintiff for the reason that the plaintiff is a nonresident and foreign corporation and none of the officers thereof are now within this district, and this action is brought upon written instruments for payment of money due and such instruments are now in the possession of affiant.

JAMES KIEFER.

Subscribed and sworn to before me January 17, 1906.

[Notarial Seal] OVID A. BYERS,

Notary Public in and for the State of Washington, Residing in Seattle.

Copy of within amended reply received and service of same acknowledged this 17th day of January, 1906.

GEO. McKAY,

For Deft.

[Endorsed]: Amended Reply. Filed in the U. S. Circuit Court, Western Dist. of Washington. Jan. 17, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

In the Circuit Court of the United States, for the Western District of Washington, Northern Division.

FIRST NATIONAL BANK OF COUNCIL BLUFFS, IOWA,
vs.
J. A. MOORE.
} No. 1128.

Verdict.

We, the jury in the above-entitled cause, find for the defendant.

J. C. NORTON,
Foreman.

[Endorsed]: Verdict. Filed Feby. 2, 1906. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy.

In the Circuit Court of the United States, in and for the Western District of Washington.

FIRST NATIONAL BANK OF COUNCIL BLUFFS, IOWA,
Plaintiff,
vs.
J. A. MOORE,
Defendant.
} No. 1128.

Amended Motion for Judgment Notwithstanding Verdict.

Comes now the plaintiff by its attorneys and enters this its amended motion and moves the Court to enter

judgment herein in favor of the plaintiff for the full amount of plaintiff's demand pleaded and prayed for in its amended complaint, including interest and attorney's fees, notwithstanding the verdict rendered in this cause by the jury in favor of the defendant on the 2d day of February, 1906, on the following grounds and for the following reasons:

I.

That there was no competent or sufficient evidence to justify the verdict.

II.

That the plaintiff's motion requesting the Court to peremptorily instruct the jury to render a verdict in favor of the plaintiff should have been granted.

III.

That all the competent evidence in the cause showed that the plaintiff was entitled to recover the full amount of the plaintiff's claim.

IV.

That the evidence of the witness, Charles R. Hannan, relied upon by defendant, was not sufficient to entitle the defendant to have the case submitted to the jury.

This motion is based upon the record of evidence taken at the trial of this cause and upon the pleadings herein.

JAMES KIEFER,
JAMES McNENY,
Attorneys for Plaintiff.

Copy of the within motion received and service of same acknowledged this 17 day of Feb., 1906.

M. M. LYTER,
For Deft.

[Endorsed]: Amended Motion for Judgment Notwithstanding Verdict. Filed in the U. S. Circuit Court, Western Dist. of Washington. Feb. 19, 1906. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

United States Circuit Court in and for the Western District of Washington.

FIRST NATIONAL BANK OF COUNCIL BLUFFS, IOWA,
Plaintiff
vs.
J. A. MOORE,
Defendant.

No. 1128.

Petition for New Trial.

To the Honorable the Judges of the above-entitled Court:

Comes now the plaintiff and prays the Court to grant a new trial and to set aside the verdict herein entered February 2, 1906, on the following grounds, and for the following reasons:

I.

In that the evidence before the jury was not sufficient to justify the verdict.

II.

For error of law occurring at the trial and excepted to at the time by the plaintiff.

III.

That the Court erred in refusing to excuse the jury during the argument and decision of the plaintiff's motion for peremptory instructions in favor of the plaintiff, thereby prejudicing the case of the plaintiff before the jury.

IV.

That the Court erred in its instructions to the jury and particularly in this, that the Court refused to instruct the jury peremptorily to render a verdict in favor of plaintiff for the full amount of plaintiff's claim; and further in this, that the Court refused to give the instructions prayed by the plaintiff; and further in this, that the Court instructed the jury that if the Citizens' State Bank, plaintiff's assignor, at the time it took the original note sued upon, had no knowledge of such facts as would put a reasonably prudent man upon inquiry, it was the duty of the Citizens' State Bank and its officers to make inquiry concerning said facts affecting the consideration for and circumstances under which the note was given, and that the plaintiff would be bound by any facts which the Citizens' State Bank might have found by making such inquiry.

V.

That the evidence before the jury was insufficient to show any knowledge on the part of the plaintiff or the

plaintiff's assignor, of any facts or circumstances surrounding the taking of the original note for $5,000 made by the defendant in favor of George J. Crane in March, 1893, on the part of the Citizens' State Bank at the time of taking said note, so as to deprive the Citizens' State Bank of being a purchaser before maturity for value without notice. This without waiving plaintiff's motion for judgment notwithstanding verdict.

JAMES KIEFER,
JAMES McNENY,
Attorneys for Plaintiff,

Copy of within petition for new trial received and service of same acknowledged this 23 day of February, 1906.

L. C. GILMAN,
Atty. for Deft.

[Endorsed]: Petition for New Trial. Filed in the U. S. Circuit Court, Western Dist. of Washington. Feb. 23, 1906. A. Reeves Ayres, Clerk. R. M. Hopkins, Dep.

February 23, 1906.

FIRST NATIONAL BANK OF COUNCIL BLUFFS, IOWA,
vs.
J. A. MOORE.
} No. 1128.

Order Denying Motion for Judgment, etc.

Now on this day this cause comes on to be heard upon plaintiff's amended motion for judgment, notwithstand-

ing the verdict rendered in this cause in favor of the defendant, the Court after hearing argument of respective counsel and being sufficiently advised in the premises, denies said motion.

And plaintiff's petition for a new trial herein being submitted to the Court without argument of counsel, the same is here and now denied.

[Entered]: Vol. 1, Gen'l Order Book, Circuit Court, Western District of Washington, page 158.

In the Circuit Court of the United States, Western District of Washington, Northern Division.

FIRST NATIONAL BANK OF COUNCIL BLUFFS, IOWA,
Plaintiff,
vs.
JAMES A. MOORE,
Defendant.

No. 1128.

Judgment.

This cause came on duly and regularly to be heard the 24th day of February, A. D. 1906, upon the plaintiff's motion for a judgment in favor of the plaintiff notwithstanding the verdict heretofore rendered herein, James Kiefer, Esq., and James McNeny, Esq., appearing for the plaintiff, and L. C. Gilman, Esq., appearing for the defendant, and the Court having heard and considered said motion, and being fully advised in the

premises denied the same, to which action of the Court in denying said motion plaintiff, by its counsel, duly excepted and its exception was allowed by the Court; thereupon, the plaintiff filed and submitted to the Court a petition to vacate and set aside the verdict herein, and for a new trial of the above-entitled cause, and the Court having considered said petition, and being fully advised in the premises, denied the same, to which action of the Court in denying said motion plaintiff, by its counsel, duly excepted and its exception was allowed by the Court; thereupon, the defendant moved for judgment upon the verdict heretofore rendered herein, and the Court being fully advised in the premises granted said motion.

It is therefore considered and adjudged that the plaintiff take nothing by this action, and that the defendant James A. Moore, do have and recover of and from the plaintiff, The First National Bank of Council Bluffs, Iowa, the costs of this action to be taxed, and that execution issue therefor. Plaintiff, by its counsel, excepts to said judgment and each and every part thereof, and its exception is allowed by the Court.

Done in open court this 5th day of March, A. D. 1906.

C. H. HANFORD,

Judge.

We hereby acknowledge service of the foregoing judgment and the receipt of a true copy thereof, this 2d day of March, 1906.

JAMES KIEFER,

JAMES McNENY,

Attorneys for Plaintiff.

[Endorsed]: Judgment. Filed in the U. S. Circuit Court, Western Dist. of Washington. Mar. 5, 1906. A. Reeves Ayres, Clerk. A. N. Moore, Dep.

In the Circuit Court of the United States, in and for the Western District of Washington.

FIRST NATIONAL BANK OF COUNCIL BLUFFS, IOWA,
Plaintiff,
vs.
J. A. MOORE,
Defendant.

No. 1128.

Bill of Exceptions.

Be it remembered that the above-entitled cause came on regularly for trial on Tuesday, January 30, 1906, at 10 A. M. before the Honorable C. H. Hanford, Judge, and a jury duly impaneled and sworn, the plaintiff appearing by James Kiefer and James McNeny, and the defendant, by George McKay, L. C. Gilman and M. M. Lyter, and thereupon the following proceedings were had, to wit: A jury was called, impaneled and sworn to try the cause, and thereupon a recess was taken until 10 A. M., January 31, 1906, and on January 31, 1906, at 10 A. M. an opening statement was made by counsel for plaintiff, and the plaintiff read in evidence the deposition of E. E. Hart, heretofore regularly taken in this cause, who testified in substance that he was president of the plaintiff bank, and that the notes in suit were

the property of the bank, had long been in its possession and had been delivered to it by the officers of the Citizens' State Bank, the payee named therein, by authority of the board of trustees of the Citizens' State Bank, and that the plaintiff paid a valuable consideration for the notes, and that the officers of the plaintiff had no knowledge of any alleged defense or defenses to the said notes on the part of the maker at the time of the delivery of said notes; and also read in evidence the deposition of one T. G. Turner, whose deposition was regularly taken, in substance that Charles R. Hannan was cashier of the Citizens' State Bank on January 2, 1902, and that he, Turner, had signed the assignment (Plaintiff's Exhibit "A") by authority of said Hannan, and that the notes in suit were delivered to the plaintiff bank on or about January 1, 1899, together with all other assets of the Citizens' State Bank, and came into the possession of the plaintiff for a valuable consideration; and plaintiff read in evidence the depositions of F. O. Gleason and F. Weis, who testified in substance that they were directors of the Citizens' State Bank of Council Bluffs, Iowa, in December, 1898, and January, 1899, and that the directors of the Citizens' State Bank had authorized the delivery of the notes in suit, together with the other assets of the Citizens' State Bank to the plaintiff for a valuable consideration, and that they were so delivered, and that the officers of the plaintiff bank had at that time no knowledge of any alleged defenses to these notes on the part of the maker; and

thereupon the plaintiff offered in evidence Plaintiff's Exhibit "A," in words and figures following:

Plaintiff's Exhibit "A."

Council Bluffs, Iowa, January 2, 1902.

For value received we hereby assign to the First National Bank of Council Bluffs, Iowa, our successors, notes for $2500.00, $2500.00 and $800.00, signed by J. A. Moore to us dated Jan. 2, 1897, and due six months after date.

CITIZENS' STATE BANK,
By CHAS. R. HANNAN,
Cas.

And thereupon, plaintiff offered in evidence Plaintiff's Exhibit "B," in words and figures following:

Plaintiff's Exhibit "B."

To the Directors of the First National Bank·

Resolved.—That owing to the fact that the stockholders of the Citizens' State Bank of this city are the owners of the stock of your bank, and in the interests of economy we wish to submit to you the following proposition:

First.—We propose to turn over to your bank sufficient cash, exchange and securities, including bills receivable, also banking-house and furniture and fixtures at a price as represented by our books, you to pay balance due contractor in an amount sufficient to liquidate the deposits of this bank in consideration of which you are to assume and pay off all liabilities of this bank to its depositors.

Second.—For and in consideration of one hundred and fifty thousand dollars ($150,000.00) we offer to turn over to you all the other assets of the Citizens' State Bank of whatever kind and description as shown by the books of said bank except such assets as are shown on list to be furnished, you to assume any legitimate claim against said bank and when proceeds of property listed be collected to be turned over to First National Bank of Council Bluffs.

Your acceptance of these two propositions carries with it the transfer of all obligations due to said bank and we hereby authorize our president and cashier to make proper transfers of real estate and personal property to you.

If you decide to accept the above proposition it must be done to-day, and you to make settlement to-day, immediately after close of business.

After a full discussion of the resolution it was adopted unanimously.

And thereupon the plaintiff offered in evidence the three notes mentioned in plaintiff's amended complaint, which were fastened together, received in evidence and marked Plaintiff's Exhibit "C," in words and figures following:

Plaintiff's Exhibit "C."

$2500. Council Bluffs, Iowa, Jan. 2, 1897.

Six months after date, for value received, I as principal promise to pay to the order of the Citizens' State Bank of Council Bluffs, Iowa, twenty-five hundred dol-

lars, at its office, with interest payable semi-annually, at eight per cent per annum after date.

And if interest be not paid when due it shall become as principal and draw interest at the rate of eight per cent per annum, payable semi-annually. This note is payable in gold coin of the United States of America equal to the present standard of value. The makers and endorsers hereof each hereby waive presentation for payment, notice of nonpayment and protest of this note, and due diligence in bringing suit against any party thereto, and sureties consent that time of payment may be extended without notice thereof. I also agree to pay all reasonable expenses, including commissions incurred in collecting this note, and a reasonable attorney's fee in addition, in case suit is brought hereon, the same to be taxed as costs of suit and in case of judgment to be entered as a part of the same. It is hereby agreed that any justice of the peace may have jurisdiction of any suit commenced for the collection of this note, not to exceed three hundred dollars.

J. A. MOORE.

$2500. Council Bluffs, Iowa, Jan. 2, 1897.

Six months after date, for value received, I, as principal, promise to pay to the order of the Citizens' State Bank of Council Bluffs, Iowa, twenty-five hundred dollars, at its office, with interest payable semi-annually at eight per cent per annum after date.

And if interest be not paid when due it shall become as principal and draw interest at the rate of eight per cent per annum payable semi-annually. This note is

payable in gold coin of the United States of America equal to the present standard of value. The makers and endorsers hereof each hereby waive presentation for payment, notice of nonpayment and protest of this note, and due diligence in bringing suit against any party thereto and sureties' consent that time of payment may be extended without notice thereof. I also agree to pay all reasonable expenses, including commissions incurred in collecting this note, and a reasonable attorney's fee in addition, in case suit brought hereon, the same to be taxed as costs of suit and in case of judgment to be entered as a part of the same. It is hereby agreed that any Justice of the Peace may have jurisdiction of any suit commenced for the collection of this note, not to exceed three hundred dollars.

J. A. MOORE.

$800. Council Bluffs, Iowa, Jany. 2, 1897.

Six months after date, for value received, I, as principal, promise to pay to the order of the Citizens' State Bank of Council Bluffs, Iowa, eight hundred dollars, at its office, with interest payable semi-annually at eight per cent per annum after date.

And if interest be not paid when due it shall become as principal and draw interest at the rate of eight per cent per annum payable semi-annually. This note is payable in gold coin of the United States of America equal to the present standard of value. The makers and endorsers hereof each hereby waive presentation for payment, notice of nonpayment and protest of this note,

and due diligence in bringing suit against any party thereto and sureties consent that time of payment may be extended without notice thereof. I also agree to pay all reasonable expenses, including commissions incurred in collecting this note, and a reasonable attorney's fee in addition, in case suit is brought hereon, the same to be taxed as costs of suit and in case of judgment to be entered as a part of the same. It is hereby agreed that any Justice of the Peace may have jurisdiction of any suit commenced for the collection of this note, not to exceed three hundred dollars.

J. A. MOORE.

And thereupon the plaintiff called as witnesses Ira Bronson, Charles McAllister and James Kiefer, who gave evidence tending to prove that J. A. Moore, the defendant herein, was not a resident of the State of Washington, and was not in the State of Washington in July, August, September and October, 1897, but came into the State of Washington in November or December, 1897, and that said Moore had no place of residence in said State during July, August, September and October, 1897.

The incorporation of the plaintiff and the Citizens' State Bank of Council Bluffs, Iowa, was admitted.

It was agreed that the matter of attorneys' fees in the event of recovery by the plaintiff be postponed and left to be fixed by the Court after a verdict in favor of the plaintiff, if any.

Plaintiff's Exhibit "D" becomes irrelevant.

Plaintiff thereupon offered in evidence a number of let ters written by the defendant to the plaintiff, which were received in evidence and marked Plaintiff's Exhibits "E" to "O," inclusive, in words and figures follow ing:

Plaintiff's Exhibit "E."

Seattle, Washington, Mar. 24, 1902.

Mr. T. G. Turner, Cashier 1st Natl. Bank, Council Bluffs, Iowa.

Dear Sir: In reply to your favor of 18th inst. would state that during the past two years Mr. Hannan and I have had considerable correspondence regarding the settlement of the claim of the old Crane notes; and I have letters from Mr. Hannan in which he states that your bank would be willing to settle on the same terms with the balance of my other creditors. It was on his urgent request and advice that I decided not to take advantage of the bankruptcy law in '97 or '98. The panic of '93 caught me as it did many others, and not only swept away all of the property that I had, but left me with judgments hanging over my head to the amount of about $50,000. With these different judgments I have been struggling for the past four years. I am still paying some of these off in monthly payments not being able to pay them all off in cash, as I have had to pay them as I could make it. To place this matter in an attorney's hands for collection at the present time would harass me exceedingly and be a detriment to yourself. You state in your letter that the proposition I made to you

was 25% less than you could take. I appreciate the consideration of Mr. Hannan in this old matter in not pushing this claim in the form of a judgment, as did some of my other creditors; for this treatment I am willing to pay you a higher rate of settlement than I made with the other parties; I therefore accept the suggestion in your letter that you would like to settle for 25% more than my offer; and if you will recall your notes from Seattle by telegraph, notifying me of the same, on the receipt of this letter I will conclude the settlement with you direct.

It will be impossible for me to pay cash on this matter, but will divide it up into quarterly payments extending over one year, and make a payment down of one-fifth of the amount agreed upon, and put the balance into notes signed by myself and endorsed by our company, which will make them absolutely good.

This proposition is made, Mr. Turner, with the understanding that you will immediately wire me on the receipt of this letter of your acceptance of the same, and the withdrawal of the notes from the party who now holds them; for if suit is commenced I will refuse to pay anything at present, and will submit Mr. Hannan's letters stating that he was willing to settle on the same terms that my other creditors did in Seattle. However, I hope that this matter can be adjusted amicably as it will be much more satisfactory both to you and myself.

Hoping to hear from you at once, I remain,

Yours very respectfully,

J. A. MOORE.

Plaintiff's Exhibit "F."

New York, Feb. 22, 1902.

Mr. T. G. Turner, Council Bluffs, Ia.

Dear Sir: Your esteemed favor of the 10th inst. received, and am sorry to hear that I will not have any more pleasant letters from Mr. Hannan. Regarding that note would state that the proposition made to Mr. Hannan was fully as good as that accepted by my other creditors in Seattle, and I am pleased to state that another year's hard work will see almost if not all my old debts paid off. I have been paying debts for the last three years—by the month, quarterly and semi-quarterly, and my creditors of "93" were all willing to accept it in this way, otherwise I could not have paid them at all and would have been compelled to take advantage of bankruptcy. Please look up my last proposition to Mr. Hannan and see if you can't accept it and thus close out this old paper. Will be in Seattle about March 10th.

Yours very respy

J. A. MOORE.

Plaintiff's Exhibit "G."

Seattle, Washington, Oct. 8, 1901.

Mr. Chas. R. Hannan, Cashier 1st Natl. Bank, Council Bluffs, Iowa,

My dear sir: In reply to your esteemed favor of 3d inst., would state that while the offer seems low to you in connection with the settlement of that old matter, yet it is really a higher percentage both in the amount of

payment per month and the total, than was paid to other parties in this city on similar matters. I feel that I have made you as liberal an offer as I possibly can, Mr. Hannan, and do not feel that under the circumstances I can do any better.

Yours respectfully,

J. A. MOORE.

Plaintiff's Exhibit "H."

New York, Sept. 11, 1901.

Mr. Chas. R. Hannan, Council Bluffs, Ia.

Dear Sir: In reply to your esteemed favor of 31st ult. which has just reached me here would state that I am willing to do what is fair on that old Crane and Bellinger note, and when I offered you $1000 for a settlement I was doing fully as much as the basis on which I am paying out my old debts with two Seattle banks. However, Mr. Hannan, you have been very nice about it and I appreciate your fairness in the whole transaction. For such consideration I will pay you $1500.00 for the claim, paying $250.00 cash and $250.00 per month until paid. I will be in Seattle October 1st so please write me there and oblige Yours very sincerely

J. A. MOORE.

Plaintiff's Exhibit "I."

Seattle, Washington, Jan. 9, 1901.

Mr. Chas R. Hannan, First Natl. Bank, Council Bluffs, Iowa,

Dear Sir: In reply to your esteemed favor of the first inst. would state that I have no other proposition to

make that would interest you any further than the one I made to you some time ago. I felt that that was the best and I still think so. If you wish to take the matter up on about the same basis I will be glad to reconsider the proposition with you.

Yours very truly

J. A. MOORE.

Plaintiff's Exhibit "J."

Seattle, Washington, Jan. 30, 1901.

Mr. Chas. R. Hannan, Cashier First Natl. Bank, Council Bluffs, Iowa.

Dear Sir: In reply to your favor of 19th inst. regarding that old note of Crains & Ballinger's would state that I believe my former proposition was to pay you $1000 in monthly installment of $100 until it was paid. I have been struggling with similar debts for the past two years and it will probably take me two years more before I get them all paid off. I will renew the above proposition and pay it either through one of our local banks or direct to you, or I will give you two notes of $500 each due in three and six months, with bankable paper.

Yours very sincerely

J. A. MOORE.

Plaintiff's Exhibit "K."

Seattle, Washington, Feb. 8, 1901.

Mr. Chas. R. Hannan, Cashier First Natl. Bank, Council Bluffs, Iowa.

Dear Sir: In reply to your esteemed favor of 4th inst.

would state that looking at the matter from my standpoint my proposition was both fair and just to myself and family. As there are two different sides to look at this proposition I feel that I am making a very fair proposition indeed, and one that was accepted by our own local people in settlement of some claims by our local banks. As this whole matter emanated from your town and your fellow-townsmen received all the profits, I do not feel like being more liberal by way of settlement with your banks than I was with our own. Of course if you would rather lose the entire amount than compromise on this matter I have nothing more to say, but I am willing to effect a settlement with you on just the same terms that I am now doing with local banks and if you so desire I can refer you to said banks here.

Yours respectfully

J. A. MOORE.

Plaintiff's Exhibit "L."

New York, March 13, 1900.

Mr. Chas. R. Hannan, Council Bluffs, Ia.

Dear Sir: Your esteemed favor of 10th Jan. has just reached me here. Regarding the closing up of a big land deal would state Mr. Hannan that I have closed up quite a number of realty deals during the past year, but every dollar of available profit has been applied to judgment creditors in Seattle, who like hungry wolves are baying at my heels all the time. If I have my health and live long enough I expect I will get out of debt before I die. But I tell you that it is a big undertaking.

Some creditors make it extremely hard for me to get up, as they hurt my standing by taking judgment and constantly harassing me. I am pleased to say you have not been one of them. I hope to be able to do something for you during the year, Mr. Hannan, and when I do I shall not forget your decent treatment.

Sincerely yours

J. A. MOORE.

Will be in Seattle before the 1st.

Plaintiff's Exhibit "M."

New York, May 30, 1899.

Mr. Chas. R. Hannan, Council Bluffs, Ia.

My dear sir: Your esteemed favor of 24th inst. just received by me this morning on my return from Boston, and will confess that I have a "hen on" and am watching her very closely. Am glad that you too have enjoyed the luxury of stopping at what I consider the greatest hotel in the world, and my observation covers Europe as well as our own country. Now, Mr. Hannan, please do not crowd me more on that old matter. I would like to do as you suggest but I really cannot now. I am struggling under all that I can carry, and you must accept my proposition that I have made. It is fully as good as some of my Seattle settlements. I cannot pay cash now but would have to pay as per my first proposition. I should like to come via C. B. and talk the matter over with you, but it is impossible at this time as I have my ticket via St. Paul. But I will have to come east again soon and will come via your city unless we

arrange it before that time. I leave this P. M. for the coast.

Very sincerely yours,

J. A. MOORE.

Plaintiff's Exhibit "N."

New York, May 22, 1899.

Mr. Chas. R. Hannan, Council Bluffs, Ia.

My dear sir: Your esteemed favor of 8th inst. sent to Seattle has just reached me here, and must say Mr. Hannan that I fully appreciate what you say in regard to the odium that is attached to any man's commercial standing if he has passed through bankrupty, and while it means a long struggle for me, yet I am going to try to compromise and settle. I am a fighter from way back and hate to be beaten and never would have been in a fair fight, but five years depression was too much for me, and it simply carried everything away but my debts. Now, Mr. Hannan, I would like to make you a proposition that would make your directors pleased but I don't see how I can, but I will do this, add 25% to the proposition I submitted and I will try it. If you do not feel like doing this just let the acct. stand six months and I might be able to make the amount cash that I have suggested, but just use your own judgment.

Very sincerely yours

J. A. MOORE.

I will be here until the 1st when I leave for Seattle on the Great Northern road via St. Paul.

Plaintiff's Exhibit "O."

Seattle, Wash., March 13, 1902.

Citizens' National Bank, Council Bluffs, Iowa.

Gentlemen: Since my return to Seattle I received notice from an attorney by the name of James Kiefer stating that he had those old Crane notes for collection, and unless payment was made immediately he would proceed to collect the same. If you ever wish to receive any money from these notes you must take them out of the hands of this attorney * * *. I will not even talk settlement with you while he holds these notes. Of course he can take judgment but I will let it stay there until it outlaws before I will settle through him.

Yours respectfully,

J. A. MOORE.

And thereupon the plaintiff rested.

Whereupon the defendant's counsel made an opening statement to the Court and jury.

The plaintiff interposed an objection to any testimony being offered in support of the third and fourth alleged affirmative defenses pleaded in the answer, for the reason that no sufficient defense is pleaded in either of those answers and therefore no testimony is admissible in support of them.

Objection overruled by the Court and exception allowed to the plaintiff.

The defendant thereupon read in evidence a transcript of the testimony of C. G. AUSTIN heretofore given in another trial of this cause. The witness testified in substance that he had resided in Seattle for the last fourteen years, and in 1893 and 1894, knew George J. Crane and F. P. Bellinger, and that they established here a sort of sanitarium for the cure of the drink, morphine and tobacco habits.

The plaintiff objected to the evidence of the witness Austin on the ground that the plaintiff's assignor, the Citizens' State Bank of Council Bluffs, was the owner of the original paper of which the notes sued on were renewals, for value, and without notice of any of the facts, and therefore the testimony is incompetent and irrelevant, and also upon the further ground that the negotiations leading up to the execution of the contract between the defendant and the Bellinger German Remedy Co., F. P. Bellinger and George J. Crane are incompetent, and also renewed its objection to the admissibility of any testimony in support of the third and fourth affirmative defenses, all of which were overruled and exceptions allowed by the Court, these objections and exceptions to apply to all the testimony of the witness Austin.

And thereupon the witness testified in substance as follows: That Crane and Bellinger offered to make it an object to Austin if he induced Moore, the defendant, to join in the organization of a company covering the whole of the United States, Canada and England, and practically the entire world, and that after making

(Testimony of C. G. Austin.)

some investigations Austin interviewed Moore in regard to the matter, and that he finally induced Moore to visit the sanitarium or institute in company with Austin, and that he was present at conversations between Moore, Crane and Bellinger in reference to the cure of which they claimed to have the formula, and that Dr. Bellinger made all the statements in regard to the formula; that Crane was not a physician, was simply interested with Dr. Bellinger in the ownership of the so-called formula, and that Dr. Bellinger explained both to the witness and to Moore very many times that it was a remedy that was a sure cure; that the formula had been prepared by his father, who had been a physician or surgeon in the German army, and on his death he left this formula as a part of the estate to go to the one of his three sons, who were all physicians, who could pay the greatest price for it, and that his father had maintained, after retiring from the army in Germany, for a considerable number of years, a sanitarium for the relief or cure of inebriates of various kinds, and it had proved a wonderful success, and there was no one either there or in this country that knew of the formula, and that he was in a position financially to give the highest price of all the brothers, and he had paid the highest price for it, and that price had carried with it that the receipts for this formula should be divided equally between the other two sons, and it was done, and that Dr. Bellinger had said that it was an absolute cure for

(Testimony of C. G. Austin.)

the drug habits, and that a certain physician had been consulted regarding it and had undertaken to analyze it, and that this preparation was quite expensive, and that it contained a certain drug that could not be procured in this country, and they had to send to Germany for it, and that there was not chemist in the United States who could analyze or determine what it was, and that he had sent it to Philadelphia to an eminent chemist there and he had said that he was unable to ascertain what one ingredient was but it was purely vegetable, and that Moore took an interest in the business, and that witness was interested with Moore and Dr. Bellinger in the company that was organized, and that there was an agreement to the effect that the formula was to be sealed up, placed in a safe deposit vault in the Merchants' National Bank and was to remain in that box intact and nobody was to have access to it. No officer of the company was permitted to open it—nobody unless Dr. Bellinger should die or lose his faculties—in that case the company was to elect a man, a physician, to take his place, and he was to be permitted to examine the formula and prepare the medicine. That the company afterward broke up and the witness went with others to the safe deposit box where the formula was supposed to be and found nothing but a piece of blank paper; and upon cross-examination he testified that he remained with the company that was formed by Bellinger and Crane with Moore for about two years, and that they carried on business during that

(Testimony of C. G. Austin.)

period and that he acted as secretary of the company; that no one accounted for any moneys in the concern either to the witness or to anyone else so far as he knew, and that Dr. Bellinger had a contract to furnish the medicines to the corporation formed by Crane, Bellinger and Moore, and did furnish them so long as the company was willing to pay the cost of them.

And thereupon the defendant, over the same objections and exceptions on the part of the plaintiff, read in evidence the deposition of Dr. F. P. BELLINGER, taken on behalf of defendant, May 2, 1903, in Council Bluffs, Iowa, as follows:

Interrogatory 1.—Did you ever have a formula for the cure of the morphine, cocaine, opium, chloral, liquor and tobacco habits, or either of said habits? If so, state when you discovered it.

Answer.—Yes, sir, I have a remedy for some of those cases, that is, drug habits; I discovered it about twenty years ago.

Interrogatory 2.—Are you the author or discoverer of such a formula as is mentioned in interrogatory No. 1?

Answer.—I am.

Interrogatory 3.—Are the contents of said formula known to any person besides yourself? If so, state the name of such person or persons.

Answer.—Not to my knowledge.

Interrogatory 4.—State the contents of said formula?

And thereupon the plaintiff, in addition to the ob-

(Deposition of F. P. Bellinger.)

jections heretofore made, made this further objection, that Dr. Bellinger entered into a written contract with the corporation which the defendant alleged was to have been formed and was formed, and that the contract was reduced to writing and all negotiations were merged into it, and therefore this testimony is incompetent, which objection was overruled by the Court and exception allowed, and the plaintiff interposed a further objection that by written contract Dr. Bellinger was under contract with the Bellinger German Remedy Co. not to disclose this formula to anyone, and that as between Bellinger and said corporation the relation of patient and physician practically existed, and that therefore the witness is prohibited by the statute of the State of Washington, from making any disclosure; which objection was by the Court overruled and exception allowed to plaintiff, and the interrogatory was answered as follows:

"Answer.—I prefer to answer that by saying that I intend to be present at the trial of this case and prefer answering the question at the time of the trial. I prefer not to answer it now. I will say that I always put up this remedy myself, and each and every case is treated separately; there is no one regular prescription to be used for everyone and they know that. It is not a patent medicine; it is a formula I have for treating individual cases; I always put up this remedy for each individual case, and it is almost impossible to answer that question unless you know the particular case.

(Deposition of F. P. Bellinger.)

Interrogatory 5.—Did you ever deliver the said formula to any of the officers of the Bellinger German Remedy Company; if so, state the name of such officer, and the office he held in the said corporation?

Answer.—I placed the formula in a safety deposit box in trust for the company, for the Bellinger German Remedy Co., but it was subject to no one's orders except my own, and only in case of an accident to me; there was no one permitted to have access to it to my knowledge, unless, of course, it was some of the officers of the company unknown to me. It was placed in the safety deposit box in trust, subject to the order of the medical director of the company, who was myself. To make that more intelligible, I will answer that this way: I put the prescription in the safety deposit box for the company, that is, in trust for the company in case some accident should happen to me, the company then would have access to it; that was ordered by the members of the company. I was instructed to place it in the safety deposit box and I did that subject to my order as medical director. I was the only one who would have access to it; in case they wanted to make any addition or improvement I was the only one who had a right to do that.

Interrogatory 6.—Did you ever disclose the contents of said formula to any other person; if so, to whom and when and for what purpose?

Answer.—I did not."

(Deposition of F. P. Bellinger.)

And finally the witness answered interrogatory 4, as follows:

"Cinchona, popine, gentian, belladonna, neurasine, nux vomica, anodyne, coco, colombo, glycerine. I vary the amount with each individual case."

And thereupon the defendant read in evidence the deposition of CHARLES R. HANNAN, taken in Detroit, Michigan, on May 20, 1904, who testified that his name was Charles R. Hannan, 47 years old, resided at Council Bluffs, Iowa; was a banker by occupation; that he has known the plaintiff bank since 1885, and was cashier of the plaintiff bank from December 31, 1899, and elected president, which position he held until January 29, 1902. That he has known this defendant since some time after taking in note from George J. Crane, and that defendant stopped off at Council Bluffs en route from the east to see witness about the renewal of the note; that he had not known him intimately, only in a business way; and further testified:

Interrogatory 5.—Did you ever take from George J. Crane a note signed by the defendant in this action? If so, state fully the circumstances under which you took the said note and state fully for whom you were acting at the time you took the same.

Answer.—I did take from George J. Crane a note signed by Mr. Moore. It was while I was cashier of the Citizens' State Bank. I had learned from Mr. Crane of the transaction he had with Mr. Moore and he had

(Deposition of Charles R. Hannan.)

advised me of the details of the deal and that he had Mr. Moore's note. Mr. Crane at that time was owing us quite a sum of money, the collateral to which I did not consider of much value, and being anxious to obtain as much collateral as possible for the note prevailed on him to turn the note over to us, which he eventually did.

Interrogatory 6.—If you say that the note was taken by you on behalf of the Citizens' State Bank of Council Bluffs, Iowa, state fully what interest in the said note was acquired by the said bank and what consideration, if any, was paid or given by the said bank for the said transfer.

Answer.—There was no consideration given for the note; I simply obtained it as additional collateral and filed it along with the collateral we then had which consisted of a lot of old insurance notes. Mr. Crane simply endorsed the note in blank and turned it over.

Interrogatory 7.—State fully the knowledge, if any, which you or the said bank had as to the consideration given by the said George J. Crane or F. P. Bellinger to the defendant for the said note of the defendant.

Answer.—Mr. Crane had fully explained to me just what he was doing—explained what they tried to do in Denver, San Francisco and other places before they went to Seattle, and I was fully advised at all times as to what he was doing. I knew full well what the note was given for it having been given for the recipe and

(Deposition of Charles R. Hannan.)

privilege of using the recipe for an opium and whisky cure.

Interrogatory 8.—State fully whether you had such knowledge, if any, at the time you took said note from the said Crane.

Answer.—As answered in interrogatory 7, I state that I knew all about the consideration for the original note.

Interrogatory 9.—Did the said bank ever acquire more than a one-half interest in the said note and if not to whom did the other half of said note belong?

Answer.—At the time the note was taken over I supposed it belonged fully to Mr. Crane as he so advised. Later on Dr. Bellinger claimed he had a half interest in the note.

Interrogatory 10.—Did the defendant ever renew the said note? If so, to whom was such renewal note or notes given, state fully?

Answer.—The note given by Mr. Moore was renewed a number of times and my recollection is that the renewal was always made to the Citizens' State Bank. The collateral book and other books of the bank are the best evidence of this.

Interrogatory 11.—State fully what was said or written to the defendant by you or any other officer or agent of said bank to your knowledge, in relation to how said bank acquired the original note of the defendant, and whether said bank held the entire interest in said orig-

(Deposition of Charles R. Hannan.)

inal note, and whether said bank was a bona fide purchaser or holder of said original note, and whether the said bank advanced anything when it acquired said original note.

Answer.—I wrote Mr. Moore many letters or caused them to be written in behalf of the Citizens' State Bank of Council Bluffs, always claiming that the bank had acquired the entire note in good faith, for value, and without notice, as the letters written by me while in the bank will show, and as stated above the bank did not advance any money or give any consideration. It did not even renew Mr. Moore's original note at the time the collateral was taken on. I wrote Mr. Moore many letters, copies of which are in the copy-books of the bank. I said anything and everything I could to get a little money out of the note. I may have signed the name of my president several times in writing these letters, but when the letters went out it was usually at my dictation.

Interrogatory 12.—Who was the cashier of the Citizens' State Bank of Council Bluffs, Iowa, on the 2d day of January, 1902?

Answer.—I have been cashier of that bank since 1885. My successor has never been elected and qualified.

Interrogatory 13.—If you answer that you were such cashier on January 2d, 1902, state whether you had given any authority to T. G. Turner to sign your name

(Deposition of Charles R. Hannan.)

to an assignment of the three renewal notes made by the defendant?

Answer.—I have never given T. G. Turner or anyone else authority to sign my name as cashier of that bank, either in writing or otherwise.

Interrogatory 14.—If you gave any such authority, state fully how such authority was given by you.

Answer.—This is answered in interrogatory 13.

Interrogatory 15.—State fully whether you gave any directions to the said Turner to sign your name to said assignment, if so state when and how you gave such direction. State fully.

Answer.—I did not give any such authority to sign in any way.

Interrogatory 16.—What authority, if any, did you give the said Turner to assign the notes of the Citizens' State Bank of Council Bluffs, and if you attempted to give him any such authority, state how it was conferred.

Answer.—As stated above I reiterate that I have never given T. G. Turner or anyone else authority to sign my name as cashier of the Citizens' State Bank for the assignment of any papers. In this I am quite positive. If any such authority was ever given the written authority would be the best evidence. My best recollection is that I have never given it, but if I did give it, it would be in writing.

Interrogatory 17.—Did you ever sign or execute any assignment or transfer of the said renewal notes given by the defendant? If so when and to whom?

(Deposition of Charles R. Hannan.)

Answer.—I have never given any such assignment.

Cross-Interrogatory 1.—When did you cease to be cashier of the plaintiff in this cause?

Answer.—When I was elected its president.

Cross-interrogatory 2.—Have you sold out your stock of the plaintiff in this cause to T. G. Turner who is now cashier of the plaintiff?

Answer.—I never sold any of my stock to T. G. Turner. In January, 1902, I sold the controlling interest in the First National Bank to one E. E. Hart at $400 per share, and I also caused a contract to be made between Mr. Hart and Mr. Turner for the sale of Mr. Turner's stock for a consideration of $275 per share. I tried to get as much for Mr. Turner's stock as I got for my own he being a brother in law of mine, but Mr. Hart would not pay it. Either Mr. Hart or Mr. Turner could exercise the right of purchase or sale at any time, it being optional. At this time the capital stock of the bank was but $100,000, surplus $25,000, and undivided profits upwards of $40,000. As soon as Mr. Hart became its president he borrowed of the bank upon the notes of himself, family and clerks upwards of $200,000 to pay me for the stock acquired from me.

Cross-interrogatory 3.—Are your relations with T. G. Turner, now cashier of the plaintiff, and the other officers and the principal stockholders and directors of the plaintiff friendly?

Answer.—So far as I know, the relations with the officers of the bank, its stockholders and directors, are

(Deposition of Charles R. Hannan.)

friendly; at least I have always believed them to be good friends of mine, with the exception of the president Mr. Hart, whom I have reason to believe is not very friendly toward me.

Cross-interrogatory 4.—When did George J. Crane tell you how he acquired the original note given by the defendant to said George J. Crane for the sum of five thousand dollars?

Answer.—Mr. Crane advised me upon his return to Council Bluffs from Seattle and the west how he had obtained Mr. Moore's note. This was prior to our taking the note.

Cross-interrogatory 5.—If you have testified that George J. Crane, the payee in the note for five thousand dollars made by the defendant herein to said Crane in March 1893, told you anything with regard to the consideration of the said note at or before the time he negotiated said note to you, state how, when and where he made such statement to you.

Answer.—The statement was made orally by him in our banking office.

Cross-interrogatory 6.—If you have testified that George J. Crane, payee in the note for five thousand dollars made by the defendant to said Crane, made statements to you affecting the consideration for said note, state whether you communicated those facts or statements to any other officer or any director of the Citizens' State Bank?

(Deposition of Charles R. Hannan.)

Answer.—I am satisfied that every director in the bank knew of the condition of Mr. Moore's collateral, as Crane' note was considered doubtful, and Mr. Moore's collateral also. I know positively that my former presiden, Mr. Edmundson, and I think the vice-president, Mr. Shugart knew particularly touching the matter, as I always explained every matter pertaining to the bank fully to our president Mr. Edmundson.

Cross-interrogatory 7.—Is it not a fact that after the merger of the Citizens' State Bank of Council Bluffs into the First National Bank of Council Bluffs, the plaintiff herein, T. G. Turner had general authority to sign your name as cashier of said bank whenever necessary to carry out and effectuate said merger and transfer; and is it not a fact that said Turner did frequently sign your name to transfers, endorsements and assignments whenever necessary to carry out and effectuate such transfer and absorption of the assets of the Citizens' State Bank by the plaintiff herein?

Answer.—It is not a fact that Mr. Turner had authority to sign my name as cashier of the Citizens' State Bank, because I was always present and made it a point to look after the details of the bank in which I was interested, and always did. It may be that Mr. Turner did use my name, but I have no recollection of it. In all matters of endorsements and assignments it was always my custom to sign myself.

Cross-interrogatory 8.—Is there not a feeling of hostility and unfriendliness between yourself and the offi-

(Deposition of Charles R. Hannan.)

cers and directors of the plaintiff herein, and has there not been such feeling of hostility and unfriendliness between you and the other officers and the principal stockholders and directors of the plaintiff since you closed your connection with the plaintiff?

Answer.—I do not think there is. I have heard since I announced last fall that I would open a bank in Council Bluffs some time during the coming season that its president, Mr. Hart, was "throwing the harpoon into me" every time an opportunity afforded; in fact I am satisfied he has done so in two or three instances, because it has come to me direct, but I pay no attention to this because I take into consideration statements coming from a man who in his position as president of the First National Bank of Council Bluffs would use its deposits as was done by himself. To explain: at the time I sold my stock to him the bank had a capital of $100,000, surplus of $25,000, and undivided profits of upwards of $40,000. There is a United States law governing National Banks, which states that no officer of a national bank shall loan to any individual or firm to exceed ten per cent of its capital stock. In this case the limit to any individual or firm would be $10,000. In the face of this law, as soon as Mr. Hart became president of the bank, he borrowed from the bank through himself, family and clerks in his office, upwards of $200,000, the proceeds of which came to me in payment for my stock. A man who would do a thing of this kind and then swear to statements as he has done I believe will

(Deposition of Charles R. Hannan.)

sooner or later come to the level where he belongs, and I do not believe that statements emanating from a man of this kind can injure me in the least. So far as the other officers and directors of the bank are concerned, I have always believed them to be my friends, and most of them have been associated with me during the time I have been in the banking business in Council Bluffs. If the other officers and directors have "it in" for me in any way I am not aware of it.

Cross-interrogatory 9.—When did you cease to be cashier of the plaintiff?

Answer.—At the time I was elected president of the bank.

Cross-interrogatory 10.—Have you not written to the defendant J. A. Moore frequently letters in the capacity of the cashier of the plaintiff and cashier of the Citizens' State Bank, demanding of Moore payment of the notes?

Answer.—I have already stated that I have written Mr. Moore many times endeavoring to collect the note.

Cross-interrogatory 11.—How many times did the defendant Moore renew his original note of five thousand dollars after it was acquired by the Citizens' State Bank and did he not make payments of interest thereon from time to time?

Answer.—I cannot say how many times the note was renewed. The books of the bank would show exactly. Several times at least. I did collect interest from Mr. Moore in one or two instances—possibly more.

And thereupon an adjournment was taken until 10 A. M. February 1, 1906.

JAMES LEE, a witness on behalf of the defendant was duly sworn and admitted by plaintiff to be qualified as an expert pharmacist, and thereupon testified that in compounding medicines a formula would enumerate the quantities of drugs to be used in the prescription, and that if a formula reading as follows: cinchona, popine, gentian, belladonna, neurasine, nux vomica, anodyne, coco, colombo and glycerine, was presented to be compounded he could not compound it, for the reason that nothing could be compounded from it, and that cinchona is a bitter tonic from which quinine is obtained; that popine is a patent medicine; gentian a bitter root, belladonna the same; neurasine a patent medicine; nux vomica a bean from which strychnine is abtained, and that there is no such drug known as anodyne, the term belonging to anything which relieves pain whether external or internal, and is usually applied to anodyne liniment for the relief of pain; coco is a leaf and colombo a root, and that among none of these drugs is there an unknown German plant or herb, and that they are common drugs well known to everybody, and that it would be impossible to mix these drugs to have any effect by way of the cure of opium, tobacco or alcohol habits, and that the formula is not intelligible.

IRA D. BRONSON, called and sworn on behalf of defendant, testified that he resided in Boston, Massachusetts, and was in the city of Seattle in 1893, and met F. P. Bellinger and George J. Crane and got well acquainted with them. That he knew J. A. Moore at that time and was asked whether he was present when any negotiations between Crane and Bellinger with J. A. Moore took place.

And thereupon the plaintiff objected to any and all evidence in support of the third and fourth affirmative defenses, on the ground that they do not state facts sufficient to constitute a defense; and further objected to the evidence offered upon the ground that the contract between Dr. Bellinger and the Bellinger German Remedy Co. pleaded in the defendant's answer is a written contract, and therefore the prior negotiations are incompetent and inadmissible, which objection was overruled by the Court and exception allowed to plaintiff, and the witness answered as follows:

A. About the first of March 1893, I don't remember the exact date but about the first of March, at the request of Mr. Moore, I went with him to an institute, so-called, that was operated by F. P. Bellinger and George J. Crane. * * *

A. I say, about the first of March, I, at the request of Mr. Moore, went to an institute, a so-called institute, that was operated by a Mr. George J. Crane and F. P. Bellinger, to investigate the value and the efficacy of a certain formula and remedy, as we called it, for the cure of the habit of tobacco, alcoholism, morphia and

(Testimony of Ira D. Bronson.)

cocaine. At that meeting we met Mr. Bellinger; I think Mr. Crane was there at that first meeting—that is my impression, I think I saw him. I stated to Mr. Bellinger what I had come for, and he at once told me—I cannot give you the language, no, I cannot do that, but I can give you the substance of it. * * *

A. That is many years ago. He said that he had a remedy that his father had discovered while he was a surgeon in the German army; that while his father was there in that position he had quite a number of soldiers who were addicted to alcoholism, and he searched to find a cure and at last discovered a herb from which he concocted, and with other things, a remedy which acted very nicely and cured the patients that he had, the soldiers. Some time after, how long I don't know, that remedy came into his possession, whether by gift, purchase or otherwise, I don't know; but he was the owner of it, and that after he became the owner of it he experimented with it and spent years, a good many years, in experimenting and in perfecting it and to that extent that it would not only cure alcoholism but also the tobacco habit and finally the cocaine and the morphia habits. In our conversation I asked him whether he was the owner of it or not. He said he was. Then I asked him about the efficacy of it, what it would do. He reiterated that it would cure those habits. Then I asked him what length of time it would take to cure them, and he said that the tobacco habit could be cured in from

(Testimony of Ira D. Bronson.)

ten days to three weeks, and my recollection is he said that some few cases he had cured even in a week. That I am not absolutely positive of, whether it was he or Mr. Crane may have said that, but I think it was Mr. Bellinger. Then I asked him if that was a cure, was a permanent cure. He said "Oh, yes." They never wanted to use tobacco afterwards. Then I asked him how long it would take to cure the alcohol habit. He said from two to three weeks, possibly four; ranging from two to four weeks, and that that was a positive cure also. Then I asked him in regard to the liquor habit—I mean the morphine habit. He said that that would take from four to six weeks. I asked him if he had had any very severe, serious cases. "Many," he said. I asked him if he always cured them. He said he did. I asked him what length of time. He said, "From four to six weeks." Being a little sceptical, I asked him further, "Are you sure that you can cure the worst habit—the worst patient, those who had been addicted the longest, in six weeks?" "Yes," he said, "almost all cases, but there may be once in a great while a case that would take eight weeks but that would cure any, absolutely any case." That, I think, was all that we had at that meeting in relation to that. I mean by that that that is all I remember.

And afterwards testified that these statements were reiterated and repeated frequently to Moore and the witness in Moore's presence. Testified that he visited the patients at the sanitarium established by Bellinger

(Testimony of Ira D. Bronson.)

and Crane in Seattle, and that there were perhaps fifteen or twenty or more patients present, and that they were playing cards and checkers and singing and were the jolliest and liveliest people the witness ever saw in his life. That he afterwards became connected with the company that was formed and had an interest in it and identified the contract entered into between F. P. Bellinger and George J. Crane and the Bellinger German Remedy Co., which was thereupon put in evidence as Plaintiff's Exhibit "P" and read to the jury:

Plaintiff's Exhibit "P."

This agreement made and entered into in duplicate this 16th day of March, 1893, by and between Dr. F. P. Bellinger and Geo. J. Crane, parties of the first part, and the Bellinger German Remedy Company of Seattle, State of Washington, party of the second part:

Witnesseth, that whereas the parties of the first part are the sole owners of formulas, prescriptions or receipts used by them in the compounding, making and preparing certain medicines for the treatment and cure of the diseases, ailments and disabilities with which those persons who are accustomed to the use of opium, morphine, cocaine, chloral, spirituous liquors and tobacco are afflicted, and which medicines are known and designated by the name of the German Remedy or German Remedy Cure;

And whereas, the party of the second part is desirous of purchasing said formula, receipt and prescription

(Testimony of Ira D. Bronson.)

otherwise known as the German Remedy formula or German remedy cure, and the exclusive right to compound, manufacture, use, vend, sell and deal in the same in any and all parts of the world, and the exclusive right to sell, state territorial and county rights to use the same:

Now, therefore, for the consideration hereinafter mentioned, the parties of the first part do hereby grant, bargain, sell, and convey to the party of the second part, its successors and assigns, both in law and equity, the said formula, receipt and prescription for the compounding, preparing and the manufacture of said medicines and the sole and exclusive right to compound, prepare, manufacture, use, vend, sell and deal in said medicines thereunder; and also all the knowledge and science which the parties of the first part are possessed of relative to the compounding, preparation, manufacture and use of said medicines and the treatment of patients thereunder.

And it is hereby agreed and understood that the party of the second part hereby purchases from the parties of the first part said formula, receipt and prescription otherwise known as the German remedy formula or German remedy cure, and the exclusive right to compound, prepare and manufacture said medicines, and the exclusive right to use, vend and sell and deal in the same, and the exclusive right to sell to any person or persons, people or peoples, corporation or corporations, country or countries, the right to use said medi-

(Testimony of Ira D. Bronson.)

cines, and all the knowledge and science of and in compounding and preparing said medicines, and in fact everything of value of whatsoever kind, character, nature or condition pertaining to medicine, and the manufacture and use thereof, whether printed or written or within the personal knowledge of the parties of the first part, or either of them, and they, the said parties of the first part, are not to nor do they reserve unto themselves or either of them for their own use or for any one else anything of value whatsoever but the whole thereof, together with the goodwill of the parties of the first part, is hereby conveyed to the party of the second part.

The consideration hereinbefore referred to for this conveyance and the right thereunder is as follows, to wit: The party of the second part hereby agrees to and hereby does sell, transfer and set over unto the parties of the first part, as their sole and separate property, all the capital stock of the party of the second part, to wit, the sum of one million dollars (1,000,000), which when issued and delivered to them shall be fully paid-up stock and nonassessable, and the same shall be shown upon the face of the certificates thereof, it being the understanding by and between the parties hereto that the right and benefit acquired by the party of the second part hereunder is of the full equivalent value of all the capital stock of the party of the second part.

This contract and agreement is not to interfere with the rights of any person or persons who have heretofore

(Testimony of Ira D. Bronson.)

purchased from the parties of the first part the right to use said medicines in the States of Washington, Oregon, Idaho, Iowa, or the county Larmie in the State of Colorado, but the party of the second part shall sell to such parties the necessary medicines required under the contracts made with such parties heretofore, but the party of the second part is to have and receive all the pay for the medicines to be delivered to such parties under said agreement.

In witness whereof the parties of the first part have hereunto signed their names, and the party of the second part has caused its president to sign his name, and the secretary to attest the same by his signature and to affix the corporate seal of the company hereto, ——. March, A. D. 1903.

DR. F. P. BELLINGER,
GEO. J. CRANE,
BELLINGER GERMAN REMEDY CO.,
By JAMES A. MOORE,
Its President.

Attest: C. G. AUSTIN,
Secretary.

Executed in the presence of:

JAS. N. SMITH.
W. A. KEENE.

State of Washington,
County of King,—ss.

Be it remembered that on this 22d day of March, in the year of our Lord one thousand eight hundred and

(Testimony of Ira D. Bronson.)

ninety-three, before me, the undersigned notary public, within and for said county and State, personally appeared Dr. F. P. Bellinger and George J. Crane, who are known to me to be the persons who are designated as parties of the first part in the foregoing agreement and who signed the same as such; also personally appeared James A. Moore and Charles G. Austin, president and secretary respectfully of the Bellinger German Remedy Company of Seattle, Washington, which is designated as party of the second part in the said foregoing agreement, and who executed the same as such, and each and every of said persons severally and collectively acknowledged to me that they signed and executed the said foregoing agreement of their own free will and accord, and said James A. Moore, as president, and said Charles G. Austin, as secretary, acknowledged to me that they executed said agreement as the free and voluntary act of said Bellinger German Remedy Company, all for the uses and the purposes therein expressed.

In witness whereof I hereunto sign my name and affixed my notarial seal the day and date last aforesaid.

WALTER A. KEENE,

Notary Public in and for the State of Washington at Seattle.

And testified that he was one of the trustees and stockholders of the corporation; that Moore and himself called at least three or four times at this institute and

(Testimony of Ira D. Bronson.)

talked with the patients; that he investigated fully for Mr. Moore, and that he traded land for a fifth of the capital stock of the corporation, and that he rated his land so exchanged at $10,000.

J. C. MOORE, being called and sworn on behalf of defendant, testified that he was a graduate physician and surgeon and had practiced medicine about eleven years, and had practiced in Seattle about four years and a half; that he was not a relative of J. A. Moore, the defendant, or in anywise connected with him; and further testified as follows:

Q. You are familiar with the compounding of drugs and the effect of drugs and compounds on the human system? A. Yes, sir.

Q. In medicine what is meant by a formula?

A. Why a formula is a combination of two or more drugs together to form some preparation.

Q. What about the necessity of quantities being specified in a formula?

A. It is always necessary to specify quantities.

Q. Supposing there was presented to you as a formula or a compound for the cure of certain disorders this, this in language: cinchona, popine, gentian, belladonna, neurasine, nux vomica, anodyne, coco, colombo, and glycerine. I will ask you whether or not you would consider that a formula? Are there any quantities given?

A. No. That would be impossible to put up any

(Testimony of J. C. Moore.)

such preparation. In the beginning, you have no quantities; and some of the drugs there are not drugs themselves, but combinations of drugs and proprietary or patent medicines; and then other drugs there are simply the crude name of which there are several preparations that are used as medicines.

Q. Supposing you would take certain quantities of each of those drugs and patent medicines mentioned, would they compound?

A. They would not compound. Unless I took enough, the dose of one would be so small that it would have absolutely no effect, while if they were large enough of the weaker drugs there are poisonous drugs there which would act as poisons.

Q. I wish you would tell me briefly the nature of each of these drugs and preparations. Cinchona?

A. Cinchona is made from Peruvian bark, of which the principal preparation made from cinchona is quinine.

Q. Popine or poppine?

A. Poppine is not a drug. I don't mean to say it is not a drug, but it is a preparation of opium which is supposed not to have the narcotic principle of opium.

Q. Gentian?

A. Gentian is made from the root of gentian, which is a bitter tonic, and it is largely used—that is, the tincture or fluid extract of the bark is generally used.

Q. Belladonna?

(Testimony of J. C. Moore.)

A. Belladonna is made from belladonna leaves; the active principle of which is atropine. It causes a dry secretion of the mouth, salivary glands.

Q. Neurasine?

A. Neurasine is a patent medicine, proprietary medicine. I don't think it is even patented, but it is a proprietary medicine put up by Adeas Chemical Company. It is a combination largely of the sedatives, the bromides—the three preparations of bromides and belladonna—the drug which is mentioned—also is contained in that, and also one or two other drugs.

Q. Nux vomica?

A. Nux vomica is made from the tree or shrub of the nux vomica tree, and the active principle in that drug is strychnine. Nux vomica is the crude drug.

Q. Anodyne?

A. Anodyne is simply a name. It means anything that will relieve pain.

Q. No drug by that name?

A. No drug by that name.

Q. Coco?

A. Coco is made from coco leaves, and the active principle in coco is cocaine.

Q. Colombo?

A. Colombo is made from the colombo roots, which is another of the bitter tonics.

Q. Glycerine?

A. Glycerine is a vehicle made from a decomposition of fats and oils.

(Testimony of J. C. Moore.)

Q. Then, as I understand, Doctor, in this preparation there is both morphine and cocaine?

A. There is.

Q. Doctor, suppose these drugs and patent medicines were mixed in any proportions of each, I will ask you whether or not it would make a compound or medicine or remedy that would cure the opium habit or the morphine habit or the liquor habit or cocaine habit or tobacco habit?

A. Well, if the dose was large enough, I think it would; but if it was smaller you would not only not cure the opium habit, but you would produce it, because popine contains—a teaspoonful dose of the preparation contains an eighth of a grain of morphine; and also you have the cocaine in the coco preparation.

Q. I will ask you whether or not any of these different ingredients which Dr. Bellinger mentions in his formula are unknown or secret preparations?

A. None of them.

Q. Do you find any secret German vegetable preparation there? A. None there; no, sir.

Cross-examination.

Q. (By Mr. KIEFER.) Doctor, could any two or more of these drugs which have been mentioned by Mr. Gilman, and proprietary preparations to be taken together in proper quantities and used with helpful results for the cure of these habits? I don't mean to take them all, but take any portion of them?

(Testimony of J. C. Moore.)

A. If you will state what proportion of these drugs, I might answer it.

Q. What I want to know is this: Would it be possible for a physician to use any two or more of these drugs in combination—of course, using his medical skill for the proper blending or combination of them, would it be possible for him to use any two or more of them with helpful results for the cure of the habits mentioned?

A. No. It would not help the habits mentioned, any of the preparations as they are stated—as it has been stated to me.

Q. You don't understand me. If he compounded them properly, having a physician's knowledge and skill on the subject, could he use any two or more of them—could he use any of them?

A. Nux vomica, rather the strychnine, which is the active principle of nux vomica, is largely used in the cure of the liquor habit, and by the proper use of it the habit is cured for a time at least in cases.

Q. Any others—any of these other drugs mentioned used in that?

A. Coco is used occasionally, a certain proportion of it.

Q. Any of the others?

A. I have forgotten just what all there were in there.

Q. (By Mr. GILMAN.) I will read them to you: cinchona, popine, gentian, belladonna, neurasine, nux vomica, anodyne, coco, colombo, glycerine.

(Testimony of J. C. Moore.)

A. Most of them there are tonics, and tonics are always used to tone up the system after the withdrawal of the liquor habit. But then belladonna—that is, belladonna as belladonna is never used; the active principle of it, the atropine, is used at times.

Q. (By Mr. KIEFER.) But of course it would have to be varied according to the idiosyncrasies of each individual? A. What?

Q. The treatment would have to be varied according to the peculiarities of each case, would it not?

A. Why certainly.

Q. You, Doctor, as a medical man, would not hesitate to say that there can be no specific put up which will apply to all cases, can there?

A. Yes, there are specifics for some cases.

Q. Which will apply to all cases I said.

A. Well, it would not be a specific if it applied to all cases. That would be a misnomer.

Q. You have to treat the liquor habit and the other habits mentioned here, you have to treat each case on its own merits, don't you?

A. You have to treat the patient.

Q. But you cannot put up any preparation which will answer for all cases each time?

A. No, you cannot.

Redirect Examination.

Q. (By Mr. GILMAN.) Then, if I understand you,

(Testimony of J. C. Moore.)

there could not be any formula that would cure these habits that I have mentioned?

A. No, sir, there is no known formula.

Q. Because you would have to individually treat a patient according to your judgment? A. Yes, sir.

Q. Now, then, is there or is there not any drug cure for these habits?

A. The history of all these cases is that after they have left the sanitarium where they are treated that they eventually drift back into their habits; it may be a longer or a shorter time in certain individual cases; but so far as any cure is concerned, there is nothing of the sort exists. If a man has will power enough after he has once straightened up from the thing to leave the drug alone, he is all right; otherwise he will eventually drift back into the use of the drug.

Q. The only cure then is to abstain?

A. Yes, sir.

Q. In case you could make a man abstain then there are certain drugs that can be given as tonics that will assist him?

A. Yes. After the withdrawal from either the opium or the liquor habit, the man is in a decidedly depressed condition and he must have the most powerful stimulants to overcome that condition. Strychnine is usually the sheet anchor in such cases.

Q. There is nothing about strychnine that is not known to the whole medical profession?

A. Nothing whatever.

(Testimony of J. C. Moore.)

Recross-examination.

Q. (By Mr. KIEFER.) Then, as I understand you, when these patients leave these so-called sanitariums and cures, who have undergone treatment for these habits that we have mentioned here, they are in a sense cured, that is, that they abstain from liquor or the drugs, as the case might be, for a time, and their ultimate abstention depends on their own will power?

A. On their will power entirely.

Dr. ALFRED RAYMOND was called and sworn on behalf of defendant, and plaintiff admitted that he was a qualified physician and surgeon, and thereupon he testified as follows:

Q. Then you are familiar with the compounding of drugs and their effect upon the human system?

A. Yes, sir.

Q. In medicine what do you mean by a formula?

A. It is the combining of a number of drugs together for some certain purpose.

Q. In certain quantities?

A. In certain quantities, whatever you wish to use in that particular case.

Q. Suppose this language was presented to you as a formula, what would you say about it: cinchona, popine, gentian, belladonna, neurasine, nux vomica, anodyne, coco, colombo and glycerine?

(Testimony of Dr. Alfred Raymond.)

A. Well, that is a double-barreled shotgun preparation.

Q. Do you think you could compound it?

A. I never did.

Q. Do you think any druggist could compound it—I mean if it was sent up to you as I have read it?

A. It is possible to put them all together. Anodyne—there is no medicine by the name of anodyne that I know of.

Q. Doctor, have you had any experience in the treatment and attempted cure of the morphine, cocaine, liquor and tobacco habits?

A. I have had some experience with morphine and cocaine habits, more than the liquor habit.

Q. Doctor, I will ask you what value you would place upon a compound of these different drugs and patent medicines that I have mentioned as a specific for the cure of the morphine, cocaine, liquor and tobacco habits?

A. Why, it is a thoroughly, absolutely, unscientific mixture, in the first place. In the second place, there are two drugs there that contain active principles of that which you want to cure—popine there is a proprietary mixture which contains morphine, and that is one principle there of the coco, concaine is prepared from that. So that you are really giving in the mixture both morphine and cocaine.

Q. And what would be the effect of giving to one addicted to the morphine habit, morphine?

(Testimony of Dr. Alfred Raymond.)

A. I think it would just lure him into the opinion that he was being cured when he was not.

Q. And would it be the same, giving coco to a cocaine fiend? A. Sure.

Q. That is, you could drug him along by giving him—

A. (Interrupting.) He would think he was cured when he was not really being cured.

Q. What secrecy is there about any of these drugs? Are they secret preparations, or anything here that is not known to the medical profession?

A. Some of them are proprietary. I mean by that they are ready-prepared. You could write a prescription for neurasine, and I think the formula of neurasine is on the bottle, but the word "neurasine" does not mean anything; it is a coined word just for the name of that combination of drugs, some half a dozen, I think. Popine is another coined word for that mixture.

Q. Doctor, suppose you could mix this stuff together in any quantities; I will ask you whether or not in your opinion as a medical man it would cure any of the habits I have mentioned or have any beneficial effect on them?

A. Well, I don't believe in the medical cure of the liquor habit.

Q. You can answer my question—would you prefer to have them separated—the different habits separated?

A. Sure.

Q. If these things could be mixed together in any quantities what, in your judgment, would be the effect

(Testimony of Dr. Alfred Raymond.)

of the administration of the compound upon one addicted to the morphine habit?

A. Well, there are so many drugs there and they would have such different actions it would be pretty hard to tell what you would get when you put them together. Strychnine, which is a tonic and a stimulant; you have all the bromides, which are depressing. Those are opposite actions. You have morphine, which is another quieting drug, and you have cocaine, the same; and you have the gentian and the colombo, which are— and bitter tonics. You see they are all opposing forces. I don't know what results you would have giving of that whole thing.

Q. As a matter of fact, doctor would it not be nonsensical to give such stuff as that?

A. It is perfectly ridiculous.

Q. Would it be the same as to the cocaine habit, the liquor habit and the tobacco habit?

A. I should think so.

Cross-examination.

Q. (By Mr. KIEFER.) Doctor, combinations could be made of two or more of these drugs which would be beneficial in the cure of these habits?

A. You could pick out from that number of drugs there things that would be compatible and be useful.

Q. And it would not necessarily mean that they must all be used for those purposes?

A. For a particular purpose?

(Testimony of Dr. Alfred Raymond.)

Q. Yes. A. No, sir.

Q. For the cure of these habits you would not undertake to use them all on the same patient?

A. No, sir—all at once, with that mixture?

Q. Yes. A. No, sir, I would not.

Q. No medical man would who understands his business? A. I don't think so.

Q. He would pick out what he needs and make combinations according to the peculiarities of the individual case?

A. Yes, there are drugs there that he could use beneficially.

Direct Examination.

Q. (By Mr. GILMAN.) If he had to pick and choose according to the particular patient he would not have any formula, would he? A. No, sir.

IRA D. BRONSON, recalled on behalf of defendant and testified that he observed Dr. Bellinger's method of administering the remedy in question to patients and that he had it "sent from their laboratory, as they called it, at Council Bluffs, and it came in bottles, numbered 1, 2, 3 and 4, and a new patient, for instance, for the cocaine habit, or the morphine habit he would take out a certain amount—I don't remember now; it is so long ago—a certain amount for the first week, and then the next week he would take out of the next bottle a

(Testimony of Ira D. Bronson.)

certain amount, then the next week out of the next bottle and so on; whether it began at No. 1 or No. 4 I don't remember. But the patients all received the same kind and the same amount of that remedy. I watched closely. I was watching it carefully to see and learn about it if I could, and it was taken out of those bottles, as I say.

Q. Then there was no varying for different patients?

A. No, sir."

J. A. MOORE, the defendant, sworn on his own behalf, testified as follows:

That he came to Seattle in 1887 and that this has been his home ever since; that in 1893 he went east on this business in the summer and was back again that fall, and was in Seattle once or twice a year practically up to 1897, at which time he came back and has been here ever since.

Q. Can you state definitely the time in 1897 that you returned? A. Not exactly, but in the fall of 1897.

Q. Can you fix it more definitely than that?

A. Well, it would be between September and December, possibly in October; I think along October or November, along in there.

Q. Now, then, Mr. Moore, how did you happen first to meet Dr. Bellinger and Mr. Crane?

A. In the spring of 1893, I don't remember the month, Mr. C. G. Austin came to me; told me that some

(Testimony of J. A. Moore.)

acquaintances or friends of his were in the city and were the owners of a remarkable specific or cure for all drug habits and liquor and tobacco habits, and wished me to investigate it with the idea of becoming interested in it. Not being a physician or knowing anything about such things, I was not very much interested in it, and did not even care to take the time to investigate the remedy; but he was very persistent; and he finally brought to my office Dr. Bellinger and Mr. Crane. They were sanguine over what they had—

Q. (Interrupting.) Well, now, Mr. Moore, instead of giving the conclusion, I wish you would state as nearly as you can the—if you cannot state the exact language state the substance of what Dr. Bellinger and Mr. Crane told you at that first interview when they came to your office.

A. They claimed to me that they had an absolute specific for the drug and liquor habits. Dr. Bellinger told me that his father, who had been a surgeon in the German army, had discovered a remedy first for the alcohol habit and by perfecting it had developed a sure cure for all drug habits; that this remedy had been handed down to him by some process, and he was the sole owner of it; that without question it was a sure cure under all conditions and under all circumstances for all the habits mentioned. I asked some friends, physicians, about it; their answer was—

(Testimony of J. A. Moore.)

Mr. KIEFER—(Interrupting.) I object to what the physicians told him.

(Objection sustained by the Court.)

Q. Go on.

A. It would seem from the information I received that if he had such a discovery it was a valuable thing. I investigated with the assistance of my friend, Judge Bronson, and they convinced us at the time that they had a sure cure for all these habits.

Q. Now, I will ask you if you subsequently entered into any business transactions with Bellinger and Crane with reference to acquiring the formula for this remedy, and if so what? State fully the details of the business which you did with them. * * *

A. These gentlemen interested several parties in Seattle; I think I can recall them. One was Angus Mackintosh, then in the Merchants' National Bank; Mr. C. G. Austin, Judge Ira Bronson and myself, in this remedy, and a company was organized to manage the business. I was to have a certain interest in the stock —a certain interest in the company, and Mr. Bronson was, I think, to have a fifth interest. I do not believe I ever received the stock. And I was to give my note for five thousand dollars, due, I think, in six months, which did. Messrs. Crane and Bellinger had a sale on for the state of California at the time, they claimed, for $20,000. This sale was practically all made excepting they had to go down there to demonstrate the value of

(Testimony of J. A. Moore.)

the remedy, which they said if it went through the money would be in and my share of it would be enough to pay the note before it was due. If they made the sale the money was never turned anywhere excepting to themselves, as it never came in to the company. I went into the business with them in good faith, believing that they had a specific and a sure cure for all the drug habits and the liquor habit. I entered into it in absolute good faith, as well as did the other gentlemen in the company. I went east to Massachusetts, accompanied by Mr. Bronson, and with positions secured offices were opened up to prove the efficacy of the remedy. We first opened in Massachusetts and were there for some time. * * * We only met with partial success there. Dr. Bellinger insisting that it was the physicians' fault that the cures were not made; and we finally asked him to come on himself—which he did—on to Boston; but he was partially successful only. He then suggested that we try in Chicago, and we opened a sanitarium in Chicago, I putting in up to that time over ten thousand dollars in cash. But that was only partially successful, and was left in the care of physicians there. I remained with the company perhaps a year and a half in various attempts to make the thing a success; but after that length of time I was convinced that it could not be made a success, and I abandoned it, with the loss of a great deal of money.

Q. Now, Mr. Moore, when you gave that promissory

(Testimony of J. A. Moore.)

note what, if any, reliance did you place in these representations that had been made to you by Crane and Bellinger?

Mr. KIEFER.—I object, if the court please. He can state what was said and done. I object to the conclusion of the witness.

(Objection overruled by the Court and exception allowed to plaintiff.)

(Question read.)

A. I believed in them fully.

Q. What was the reason for your giving the note?

A. My faith in the statements that they made.

Q. When did you first learn, Mr. Moore, that Dr. Bellinger did not have any formula at all?

Mr. Kiefer.—I object to that, if the Court please, as incompetent and irrelevant.

(Objection overruled by the Court and exception allowed to plaintiff.)

A. Not until this case was commenced.

Q. Was it this case or the former case in the superior Court?

A. The case that was in the Superior Court; but it is the same matter.

Q. How did you then learn it, Mr. Moore?

A. From the hearing of a deposition read of Dr. Bellinger's.

Q. When did you first learn that this pretended formula of his did not contain any secret drugs or remedies?

(Testimony of J. A. Moore.)

Mr. KIEFER.—We make the same objection to that.

(Objection overruled by the Court and exception allowed to plaintiff.)

A. I did not know what was in the remedy until this formula was given in the deposition.

Q. Now then, when did you learn that this note that you had given to Crane for himself and Bellinger had been transferred to the Citizens' State Bank of Council Bluffs, Iowa?

A. Prior to its—or about the time it matured.

Q. Did you have any correspondence or conversation with anybody connected with that bank in reference to it? A. Yes, sir.

Q. Now then, I will ask you in your conversations with Mr. Hannan, what he stated to you in reference to the manner or method in which the bank had acquired the notes? A. Mr. Hannan stated to me—

Mr. KIEFER.—We desire to object to that. It is wholly incompetent, irrelevant and immaterial what Mr. Hannan may have stated. Suppose he had paid this note he could not recover the money back. They were not dealing in any relation of trust.

The COURT.—I will allow Mr. Gilman to prove what he outlined in his opening statement.

(Objection overruled by the Court and exception allowed to plaintiff.)

A. Mr. Hannan said to me personally, as well as in correspondence—

(Testimony of J. A. Moore.)

The COURT.—(Interrupting.) Omit the correspondence; tell what he said personally.

A. Personally that the note had come into the possession of the bank in the ordinary course of banking business; that they had discounted the note and paid the full face value of the note, and that he would look to me for the payment of the note.

Q. What, if anything, did he say to you about any knowledge of the fraud that had been perpetrated upon you?

Mr. KIEFER.—I object, if the Court please.

(Objection overruled by the Court and exception allowed to plaintiff.)

Q. As to whether or not when they took the note they had any knowledge?

A. I don't think there was anything said at that time, Mr. Gilman.

Q. Just stated he took it in the regular course of business?

A. The regular course of business; bought the paper and paid for it.

Q. How many times did you renew the note, Mr. Moore? A. Two or more.

Q. Until it finally got down to these notes which are in suit here, being given as renewal notes?

A. Yes, sir.

Q. Now then, I will ask you when you first learned that the bank had not acquired this note in the regular

(Testimony of J. A. Moore.)

course of business and had knowledge of the circumstances under which you gave the note?

A. Not until Mr. Hannan's deposition was taken and read in a former trial of this case.

Q. That is the trial in the Superior Court?

A. Yes, sir.

Q. Was that before or after these notes were given which are the subject of this suit? A. It was after.

Q. What induced you to renew the note, Mr. Moore?

Mr. KIEFER.—I object to that, if the Court please, as incompetent, irrelevant and immaterial.

(Objection overruled by the Court and exception allowed to plaintiff.)

A. I was led to believe that the bank had purchased the notes in good faith; that no matter what my impressions were as to the original deal; that if the bank became the possessor of them as an innocent purchaser there was no recourse for me but to pay the notes. I kept renewing the notes expecting to do so.

Q. Now, certain letters of yours have been introduced in evidence here; I want to ask you whether these letters were written before or after you became possessed of the knowledge that the bank knew of the circumstances of your giving this note at the time it had purchased it?

A. Those letters were all sent—written by me prior to my knowledge of any action on the bank but good faith in securing the note. Mr. Gilman, may I be per-

(Testimony of J. A. Moore.)

mitted to make a statement in regard to the remedy that I omitted to make in my former answer?

Q. Certainly.

A. One of the strong points that was made in the statements by Dr. Bellinger and Mr. Crane in regard to the value of the remedy as a cure for the drug habit, was that it absolutely contained no morphine or opium in any form whatever. I omitted to make that statement.

Q. Did you witness Dr. Bellinger treat any patients that you had at any place? A. Beg pardon.

Q. Did you witness Dr. Bellinger's method of treatment of the patients at any place? A. Yes, sir.

Q. State what it was.

A. He had his medicine put up in certain bottles which he had numbered from 1 to 5. These remedies were given to the patients out of these bottles, and the remedy was the same for all patients; that is, for the drug habits the remedy that was given out of these bottles from time to time and the whole class that they had, or the whole number that was under treatment; there was no change of the remedy. He put it up wholesale and it was given to them either by Dr. Bellinger or by the physicains under him.

Q. That was sent on from Council Bluffs by wholesale, was it? A. Yes, sir.

Q. Who was this Mr. Hannan of whom you spoke; what was his relation to the Citizens' State Bank?

A. He was cashier of the bank at that time.

(Testimony of J. A. Moore.)

Q. What reliance, if any, did you place on his statement that he made to you regarding the manner in which the note was acquired? A. I believed them.

Q. About what date was it that this case was tried in the Superior Court?

Mr. KIEFER.—September 8, 1903; September 8 and 9, 1903.

Mr. LYTER.—Let the record show it is agreed.

Cross-examination.

Q. (By Mr. KIEFER.) Mr. Moore, you say you returned here you think in October or November, 1897?

A. Yes, sir.

Q. Do you remember the circumstances of going to Mr. McAllister's house to live? A. Yes, sir.

Q. How soon did you go there after you came to the city?

A. I don't know. When I came back first I went to Mr. Bronson's residence—Mr. Ira Bronson's and lived with him some little time, Mrs. Moore and I, and I don't remember just how long after it was, Mr. Kiefer.

Q. It was not more than a couple of days though, was it? A. Oh, yes; oh, yes; possibly a few weeks.

Q. Possibly a few weeks? A. Yes, sir.

Q. Now, it is a fact then that you went to Mr. McAllister's to live on the 14th of December, 1897?

A. Well, I don't know.

Q. You don't dispute his statement on that point?

(Testimony of J. A. Moore.)

A. No, sir. If he states that I went to his house on the 14th of December, I have no doubt but what that was the date, Mr. Kiefer.

Q. And you were not in the city more than a few weeks prior to that time? A. No, I don't think so.

Q. Sir? A. No, sir.

Q. Three weeks?

A. I don't know; it might have been two; it might have been four; it might have been longer. I don't remember, Mr. Kiefer.

Q. But you don't claim to have been here earlier than October? A. No, sir, I don't think so.

Mr. KIEFER.—I want to cross-examine the witness upon that point further—I omitted to bring something with me and I want to use it on the cross-examination of the witness on this point.

Q. And what had you been doing before you returned to the city; where had you been?

A. I had been kind of living in my trunk all over the country.

Q. I mean that particular year you had been in Mexico, hadn't you? A. Yes, sir.

Q. You had been in Atlanta, Georgia?

A. Yes, sir.

Q. When did you go to Mexico?

A. I went to Mexico, I think it was the latter part of 1895.

Q. I mean in the year 1897. Did you remain there continuously from 1895 to 1897?

(Testimony of J. A. Moore.)

A. Oh, no. No, I was back here once after I was in Mexico; possibly twice—back in Boston, back in Chicago, and back to Mexico again; left Mexico in the summer of 1897.

Q. What time in the summer?

A. It must have been July or August.

Q. How long did you remain there?

A. In Mexico?

Q. Yes.

A. I was there from seventeen to twenty months I should think.

Q. No, I mean in the summer—in the year 1897; what time did you go to Mexico in the year 1897?

A. Well, I was in Boston in the spring of 1897, and back into Mexico again. I was at Chihuahua.

Q. You went to Mexico about the month of June, didn't you? A. Well, I don't know, Mr. Kiefer.

Q. How long did you remain there?

A. Well, I had been there for seventeen or eighteen months.

Q. At that time how long did you remain there in the summer of 1897?

A. I don't know, Mr. Kiefer; a few months I think.

Q. Two or three months? A. I should judge so.

Q. Where did you go from there?

A. Came up to El Paso.

Q. How long did you remain there?

A. Only a few days.

Q. Where did you go to then?

(Testimony of J. A. Moore.)

A. To Atlanta, Georgia.

Q. How long did you remain there?

A. I was sick there. I was there perhaps six weeks.

Q. And where did you go to from there?

A. Came up to Denver.

Q. How long did you remain in Denver?

A. I was sick again there. I was there perhaps two or three weeks.

Q. And came back here to Seattle in December then?

A. No, it was earlier than December, Mr. Kiefer.

Q. You think it was?

A. Yes, sir, I am quite sure it was.

Q. You say you went into this cure of Dr. Bellinger's in 1893? A. In 1893, yes, sir.

Q. What time did you meet Dr. Bellinger and Mr. Crane in this connection? A. In the spring of 1893.

Q. Do you remember the date? A. No, sir.

Q. You do not? A. No, sir.

Q. You made investigation of this cure for some time before you went into the deal with them?

A. Yes, sir. I thought I was quite smart.

Q. You went to the institute and observed the patients? A. Yes, sir.

Q. You visited there frequently?

A. Yes, quite a number of times.

Q. And you also consulted physicians with regard to it? A. I did.

(Testimony of J. A. Moore.)

Q. And you had Judge Bronson as your attorney to go with you and assist in the investigation?

A. The Judge did not help me as an attorney; he was more of a friend or counsellor in the matter. But he investigated too.

Q. Now, Mr. Moore, you relied a good deal upon the cures which you observed there, didn't you?

A. Yes, sir, I believed that they were doing good work there.

Q. And they were doing apparently a prosperous business?

A. Yes, sir. From their statements they were making money very fast.

Q. Well, they had a large number of patients?

A. Yes; seemed to have.

Q. Now, finally a corporation was formed was it not? A. Yes, sir, I think so.

Q. I will show you certain articles of incorporation here; look at them and see if those are the articles of incorporation of the Ballinger German Remedy Co.

A. Why, I could not remember, Mr. Kiefer, whether these are the articles or not, but I have not any reason to doubt but what they were.

Q. You signed articles as one of the incorporators?

A. I expect I did; I don't remember now, but I believe I did.

Mr. KIEFER.—We offer in evidence these articles.

(Document received in evidence and marked Plaintiff's Exhibit "Q," which is as follows:)

(Testimony of J. A. Moore.)

Plaintiff's Exhibit "Q."

ARTICLES OF INCORPORATION OF THE BELLINGER GERMAN REMEDY COMPANY.

This is to certify that we, F. P. Bellinger, George J. Crane, Charles G. Austin, James A. Moore, Ira D. Bronson and Angus Mackintosh, citizens of the United States of America and residents of the city of Seattle in King county and State of Washington, being desirous of forming a corporation pursuance to and in conformity with the laws of said state, do hereby make and subscribe and acknowledge in triplicate the following Articles of Incorporation in writing.

Art. I.

The corporate name of this company shall be the "Bellinger German Remedy Company."

Art. II.

The objects and purposes for which this corporation is organized is to compound, manufacture, use and vend medicines in any and all of the civilized countries of the world; to sell and dispose of rights to use and vend said medicines; to establish and operate drug stores and pharmacies and to carry on a general drug business, either wholesale or retail in any part of the world; to establish, maintain and operate medical institutes and hospitals in any state, territory or country, and to purchase and hold the necessary real estate upon which to build and erect the same; and to do and perform any and all kinds of business pertaining to

(Testimony of J. A. Moore.)

pharmacy and pharmaceutics; also to purchase, hold and sell such other kinds of property both real and personal as the corporation deems for its best interests, also to mortgage the same if it desires.

Art. III.

The capital stock of this corporation shall be one million (1,000,000) of dollars, which shall be divided into ten thousand shares of one hundred (100) dollars each.

Art. IV.

The time of existence of this corporation shall be for the term of fifty (50) years, which shall commence on the day of the date of these articles.

Art. V.

The trustees of this corporation shall be six in number and the names of those who are to manage the concerns of this corporation for the first six months are F. P. Bellinger, George J. Crane, Charles G. Austin, James A. Moore, Ira D. Bronson and Angus Mackintosh.

Art. VI.

The principal place of business of this corporation shall be in the city of Seattle in the county of King and State of Washington, but branch offices may be established at such other places as the corporation may select.

In witness whereof we have signed these articles in triplicate at said city of Seattle on this fifteenth day of

(Testimony of J. A. Moore.)

March, in the year one thousand eight hundred and ninety-three.

JAMES A. MOORE.
F. P. BELLINGER.
GEO. J. CRANE.
C. G. AUSTIN.
IRA D. BRONSON.
ANGUS MACKINTOSH.

Executed in presence of:

C. W. MATRONS.
A. ROBINSON.

State of Washington,
County of King,—ss.

Be it remembered that on this fifteenth day of March, A. D. 1893, before me, the undersigned, a notary public in and for the State of Washington, personally appeared F. P. Bellinger, George J. Crane, Charles G. Austin, James A. Moore, Ira D. Bronson and Angus Mackintosh, both personally known to me and known by me to be the identical persons named in and who made and subscribed the foregoing articles of incorporation, and they did severally each for himself and not for the other, acknowledge to me that they made and subscribed the foregoing articles of incorporation freely and voluntarily and for the uses and purposes therein expressed.

In witness whereof I have hereto set my hand and

(Testimony of J. A. Moore.)

affixed my notarial seal the day and year in this certificate first above written.

C. A. MATRONS,

Notary Public in and for the State of Washington, Residing at Seattle, Washington.

Q. Mr. Moore, after the corporation was formed, as its president did you sign this contract which I show you between F. P. Bellinger and George J. Crane (showing Plaintiff's Exhibit "P" to witness)?

A. Which is the contract, Mr. Kiefer? Is this it here? I believe that is my signature, Mr. Kiefer.

Q. As president of that corporation, the Bellinger German Remedy Company?

A. It is so indicated.

Q. Mr. Moore, this contract was entered into after the corporation was formed?

A. Yes, I should judge so.

Q. And that evidenced the contract between the corporation and Dr. Bellinger and Mr. Crane?

A. I presume so. The formula, of course, was never given to the company; we never got that formula.

Q. Now, Mr. Moore, you in the course of your inquiries and investigations learned what states they had sold—the state rights, the local rights that they had sold for the use of this remedy? A. Yes, sir.

Q. You had nothing to do with this local institute here? A. No, sir.

Q. How long did you say this note was to run for?

(Testimony of J. A. Moore.)

A. My recollection is six months.

Q. Was it not a ninety-day note?

A. Well, that is possible. That is possible. I am not clear on that. It may have been ninety days; possibly six months.

Q. And that note was given after the corporation was formed and after the contract was entered into?

A. That I don't remember, Mr. Kiefer, whether it was before or after.

Q. You don't remember? A. No, sir.

Q. You would not pretend to say?

A. No, sir.

Q. Mr. Moore, when this note matured you went on to Council Bluffs?

A. I went to Council Bluffs via San Francisco, I think. Crane and Bellinger were then operating in San Francisco proving their cure which they claimed they had sold the state for twenty thousand dollars, and I was led to believe that there would be enough out of that sale down there to pretty near take care of that note. Much to my surprise, I never got a dollar out of the State of California. I think I called at Council Bluffs on my way east possibly, I don't remember as to that; but I interviewed Mr. Hannan about the renewal of the note.

Q. Do you remember these circumstances? Do you recollect going to San Francisco and finding out that their sale had fallen through because of the failure of a bank? A. In California?

(Testimony of J. A. Moore.)

Q. Yes; one of the San Francisco failing and involving the parties to whom this sale was made or about to be made?

A. I don't recall why the sale fell through, Mr. Kiefer, if it did fall through. They were there—oh months afterwards.

Q. Yes, they remained there. But I ask you this question: Is it not a fact, Mr. Moore, that you went down to San Francisco some time after giving this note and entering into this deal here, where Dr. Bellinger was and Mr. Crane, and that you learned that they had made a sale of California, and the money was on deposit in one of the banks there by the people to whom the sale was to be made, and that the failure of the bank a day or two before the consummation of the deal prevented its consummation?

A. I remember, Mr. Kiefer, that there was something—some hitch in some part of the trade, but they had taken it up with other parties and expected to consummate the deal.

Q. Afterwards took it up with other parties?

A. Yes, sir; but I am not clear on that.

Q. Do you remember in San Francisco, on the occasion of that visit, making a very strenuous appeal to Crane to return to you your five thousand dollar note?

A. I don't remember much on that point, Mr. Kiefer.

Q. Have you any recollection on that subject?

A. He was so positive that the sale of California would take care of that note when it matured, that is,

(Testimony of J. A. Moore.)

pretty near enough of it—at least my share would have been four thousand dollars, that it is possible that I asked him for an extension of the note. I don't think that I asked him to return the note.

Q. Well, now, then didn't you have this conversation with him: didn't you ask him to return to you that note, and tell him that you were very much embarrassed; you wanted the note back, and get out of the thing; and he told you it was impossible because he had turned the note over to the Citizens' State Bank of Council Bluffs, his home bank?

A. Why, I don't recall, Mr. Kiefer; it is so many years ago that that phase of the subject has not entered my mind perhaps for thirteen or fourteen years.

Q. And didn't he tell you then further in that conversation, that you had better get in and try to push the remedy, and that you then made up your mind to get in and do your share towards exploiting it and try to get it in that way?

A. It is possible I did; I don't remember.

Q. In going into this trade you relied very largely upon the profits of selling state rights to use the medicine, didn't you?

A. That was the business proposition that was submitted to us, where the money was, was to sell out the state rights after demonstrating their value.

Q. And that was the form that your exploitation of this remedy assumed, was it not? A. Yes, sir.

(Testimony of J. A. Moore.)

Q. You went to Boston and opened an office?

A. Yes, sir.

Q. On the subject of the renewal of this note I will show you a letter dated November 28, 1893, and ask you if you wrote it?

A. Yes, sir, that is my letter.

Q. Written to Mr. Crane? A. Yes, sir.

Q. That was after you had opened the Boston institute? A. Yes, sir.

Q. You had had some considerable experience with that at that time?

A. Well, I was just getting started.

Mr. KIEFER.—I offer this letter in evidence, if the Court please.

(Letter received in evidence without objection, marked Plaintiff's Exhibit "R," and read to the jury, and which is as follows:)

Plaintiff's Exhibit "R."

Boston, Mass., Nov. 28, 1893.

Dear Mr. Crane,

Yours of the 21st to hand and contents carefully noted. In reply would say in regard to the note at Council Bluffs that they are not going to bother you in any way. They have accepted new notes from me made payable to them and will return the note made payable to you at once thus releasing you. The new notes given do not mature before Jan. 21st, so that are fixed for the present. Before that date we will have several

(Testimony of J. A. Moore.)

states in New England sold. I have four states well under way, including N. Y. to friends of ours for $75,000 cash. Also have parties working up a syndicate in Chicago at the same price. I have telegraphed to Dr. B. this morning to cash dft on me and come at once. I am opening up an immense business here and must have his assistance. I can do the business part of it but have felt that in some ways Dr. B. could help out amazingly. In fact must have him for awhile. I have been in correspondence with some friends in Texas who tell me that they will buy Texas just as soon as we can come and make a few cures. I have found Bro Crane that the less we talk the liquor cure the better we do. The country has been burned to death by liquor cures and a new cure for morphine seems to take all right. Dont get discouraged because I am going to make you some money whether you sell Cal. or not. With best wishes and kind regards,

I remain,

Yours very sincerely,

J. A. MOORE.

Q. Mr. Moore, when you renewed this note which you speak of in that letter, you got back from the Citizens' State Bank of Council Bluffs the note which you had given originally; that note was delivered to you—the note, the five thousand dollar note which you had given to Crane; that was then surrendered to you by the bank?

A. I presume it was; I don't remember, but it ought to have been if it was not.

(Testimony of J. A. Moore.)

Q. You are too much of a business man to give a new note and leave the old one in the hands of the party you renew it to? A. I think so.

Q. You would hardly do that. That renewal note was, as you state there in the latter, payable directly to the bank? A. I fancy it was.

Q. And you split it up into two or three notes at that time, didn't you?

A. No, I think that was later, Mr. Kiefer.

Q. You speak in the letter of "notes"; now did you split it up at that time or not; what is your best recollection?

A. It is possible a note was given for the interest; but I don't know—it may have been split up at that time, Mr. Kiefer.

Q. But at any rate you did get back your note payable to George J. Crane and by him endorsed, and that was surrendered to you, and you gave notes payable directly to the Citizens' State Bank?

A. Evidently so.

Q. Now, Mr. Moore, you continued in this business for how long? A. Over a year.

Q. I show you a letter dated March 3, 1895, and I ask you if you wrote that letter? A. Yes, sir.

Q. You wrote that letter to Mr. Crane?

A. Yes, sir.

Mr. KIEFER.—If the Court please, we offer in evidence the letter just identified by Mr. Moore previous to the adjournment.

(Testimony of J. A. Moore.)

Mr. LYTER.—What is the purpose of the offer?

Mr. KIEFER.—The purpose of the offer is to show the length of time that Mr. Moore engaged in this business, and the nature of the success made by him, and the interest taken in it by him. It is part of his cross-examination. For all purposes—for anything that may be shown by the letter.

(Letter received in evidence marked Plaintiff's Exhibit "S," and read to the jury, as follows:)

Plaintiff's Exhibit "S."

Denver, Colo., March 3rd, 1895.

Geo. J. Crane, Esq., Fort Smith, Ark.

Dear Sir,

Your favor of a recent date received on my return to the city Saturday. I wrote you quite fully to Council Bluffs, but thinking that you might not return soon concluded to write you a few lines to Fort Smith.

You state that you have given an option on the whole world for $100,000. This seems rather low when you take into consideration that it will not pay out the price of the stock lying in escrow in Seattle, and to own said stock the different shareholders would have to pay for same out of their pockets—and the world sold.

In regard to your statement that you had to deed Cal. for debt does not sound very good when you stated to us in order to get us to take hold of the scheme that

(Testimony of J. A. Moore.)

you had a standing offer for Cal. of $30,000 cash. This statement was one of the inducements that influenced Mr. Bronson and myself, and I presume Mr. Austin too. In regard to Texas would state that I have given a deed to that state and the company will ratify what has been done by me. You might go to Texas and cause a little dissatisfaction but it would do you no good whatever and you would be out your expense. I have given an option on Missouri, Ohio and Pennsylvania and six southern states, and I believe the option on Mo. will be taken up. It calls for $20,000 cash on May 1st and the party making sale gets $25,000. Now, Mr. Crane, there is no profit in us getting to fighting as it will only ruin all prospects of us ever getting anything out of the business. If we get to scrapping we will only destroy each other. I have not made a dollar out of the thing, in fact have lost a barrel of money and hate to let go until we get some out. Your option on the world for $100,000 of course is a bluff and I want you to help me on that Missouri deal. While there is $25,000 in sight we must make up our minds to be sweet to each other long enough to get that money even if we again go to scrapping soon as the deal is closed. Dont you think so? The parties who are buying Mo. are principally Denver people and I am quite positive the deal will go if we can pull together for a brief period. I got knocked out in N. O. by parties who looked into the record of sanitariums already established and other reports not com-

(Testimony of J. A. Moore.)

plimentary to the Co. Write me here at once in regard to the Missouri deal and oblige,

Yours very truly,

J. A. MOORE.

Mr. KIEFER.—I offer a letter written under date of Seattle, July 20, 1893.

Q. Did you write that letter (showing letter to witness)? A. Yes, sir.

Mr. McKAY.—We desire to interpose this objection: that this is between two officers of the company in a communication between an officer of the company to another officer of the company, and it cannot be taken as evidence in favor of the plaintiff, nor as evidence against the defendant in favor of the plaintiff. In other words, it is a matter between third persons and not at all between the plaintiff and defendant, or between the defendant and the predecessor in interest of the plaintiff.

Mr. KIEFER.—It is a declaration of this witness on the stand, if your Honor please, with reference to this matter; and it is not an official letter; it is signed by him in his individual capacity. I submit it is inadmissible as showing what he was doing with this very business.

The COURT.—Now, Mr. Kiefer, I will instruct that if this business was a fraudulent business, and Mr. Moore was engaged in it with full knowledge that it was fraudulent, and his participation would not give any validity

(Testimony of J. A. Moore.)

to the alleged consideration—if the consideration was in fact an illegal or a valueless consideration—Mr. Moore's voluntary participation in the fraud, if he did, would not change the relative value of the consideration so as to make this note valid. I do that on the ground is not as you contended yesterday, that a voluntary payment of the note would bind Mr. Moore so that in a suit to recover back the money he would not be entitled to recover it back. While that is true it is different where he is defending; he could not ask a court of equity to help him recover against a co-conspirator in a fraudulent enterprise; neither can anyone who is attempting to enforce against him a right founded upon a fraudulent enterprise prevail in a court of law; because the Court will leave them alone where they have placed themselves.

Mr. KIEFER.—This letter is offered, if your Honor please, with showing Mr. Moore's then opinion of the value of what he had purchased, and of what he was doing with it. The allegation here is that it was utterly worthless, although we contend that is not an issue tendered by those pleadings, but this letter is offered to show how he dealt with it.

Mr. GILMAN.—We will concede that for a very long time, Mr. Kiefer, Mr. Moore did have faith in this remedy.

The COURT.—The objection is sustained on the

(Testimony of J. A. Moore.)

ground that it is taking up the time of the Court unnecessarily.

(Exception allowed to plaintiff.)

The COURT.—If you have any letter there in which Mr. Moore makes a contradiction—contradicts his testimony as to the representations that were made, that would be admissible; but anything that he may have said indicating that he was trying to carry out the scheme that he says he went into, is just taking time for nothing. He has testified fully and completely that he went into that scheme.

Q. That is your signature to that letter is it, Mr. Moore? A. I think so.

Mr. KIEFER.—I offer in evidence a letter dated Chicago, May 7, 1894, which I presume the Court wishes to see before the ruling upon it.

Mr. McKAY.—We object to it, if your Honor please.

(Objection sustained by the Court and an exception allowed to plaintiff.)

(Last two letters are marked respectfully Plaintiff's Exhibit "T" and Plaintiff's Exhibit "U," offered and refused, as follows:)

Plaintiff's Exhibit "T."

Seattle, Wash., July 20, 1893.

Dear Mr. Austin,

We arrived here in due season and have attacked Boston in dead earnest. We have several parties inter-

ested already and I sincerely believe that we will close a deal inside of 10 days. There are dead loads of drunks in this city and we have a class of about 15 ready to take the treatment just as soon as we open up. I wired you to send medicine as I am afraid the folks in Frisco might be slow and I can't understand why you should wire back that you have no medicine. I hope that such is the case for it shows that institutes are using medicine. Cheer up, Bro Austin, we have a grand thing and we will make some money very soon. I believe we will sell Mass. before Crane gets Cal. sold. With best wishes and kind regards, I remain,

Yours very truly,

J. A. MOORE.

Plaintiff's Exhibit "U."

Chicago, May 7, 1894.

Mr. Geo. J. Crane, Donahue Bldg., San Francisco, Cal.

My dear Friend,

Your favor of a recent date to hand and in which you state that the medicine has at last arrived for which I am truly thankful. I dont see how it is possible for me to help you out any financially at the present time, as you are well aware it costs a lot of money to get things started and I cannot afford to jeopardise our prospects here by embarrassing myself at the present time. I gave Dr. Bellinger $200 not long since which he said he wished to send to California and then I paid him $200

(Testimony of J. A. Moore.)

more for some medicine. Doctor has been so miserable in health that I could not depend on him at all for giving treatment and I had to have Dr. Harrison come here for that purpose. The trouble with Dr. Bellinger is that you cannot depend on him at all to do business. He has no conception of the necessity of keeping engagements and with morphine patients whenever you break faith with them you might as well quit, just as soon as they lose confidence in you you have lost all control or influence over them. I dont see how you ever managed to hold the doctor down sufficiently to get him to attend to business. We have a fine class of patients at the present time and you can look for something to drop almost any minute from this end of the line. With kind est regards and best wishes,

I remain as ever,

Your sincere friend,

J. A. MOORE.

Q. Mr. Moore, how much money did you pay the Citizens' State Bank on account of this note from time to time?

A. I don't believe, Mr. Kiefer, that I ever paid the bank anything on the note at all; but it is barely possible that in the early period of those renewals that I paid some interest, but I am not clear on that subject.

Q. How many times did you renew the note?

A. That I don't know either, Mr. Kiefer. There are several times.

(Testimony of J. A. Moore.)

Q. The first renewal took place at the time of the maturity of the first note, didn't it—of the original note?

A. I don't know whether it was exactly at maturity or shortly afterwards; I could not say.

Q. It was either at maturity or very shortly afterwards? A. That I don't know either, Mr. Kiefer.

Q. And it was of interest to you at that time to get time on the note, was it not?

A. Well, I could not pay it.

Q. You were not able to pay it? A. No, sir.

Q. Now, Mr. Moore, you sold a number of State rights? A. Yes, sir.

Q. What States did you sell?

A. We sold Connecticut, I think.

Q. What did you receive for it?

A. We received something like fifteen hundred or two thousand dollars.

Q. What other places did you sell?

A. We sold New Hampshire, but that trade was never consummated.

Q. Did you get anything out of it?

A. No, sir. There was some money paid on Maine.

Q. How much on Maine?

A. I don't know on Maine. There as a combination of Maine, I think, and New Brunswick, possibly together, and there was some money paid on those, perhaps a thousand dollars; I don't recall now just how much it was, Mr. Kiefer.

(Testimony of J. A. Moore.)

Q. What price was bargained for Maine and Nova Scotia? A. I don't remember now.

Q. You don't remember the price? A. No, sir.

Q. You sold Massachusetts, didn't you?

A. We never got any money out of Massachusetts.

Q. How much was the bargain for Massachusetts?

A. There was not any definite sum, I don't think, Mr. Kiefer, agreed to for Massachusetts. It was dickered at for a good while, and a kind of conditional sale made, if I remember right, but we never got a dollar for Massachusetts.

Q. Was not the price to be twenty thousand dollars?

A. Well, it is possible that it was.

Q. And didn't you get fifteen hundred dollars on account of Maine and Nova Scotia?

A. That may be true also. It was ten or fifteen hundred dollars, something like that.

Q. You tried Chicago? A. Yes, sir.

Q. What did you accomplish there?

A. We did not get—we did not effect any sale there.

Q. Now, then, you tried Texas? A. Yes.

Q. What did you do with Texas?

A. There was a partial sale made of Texas; if I remember correctly, somewhere from one thousand to two thousand dollars was paid in on Texas.

Q. Now, when you carried on these institutions didn't you receive compensation from your classes?

A. Very little. The doctors in charge received some

(Testimony of J. A. Moore.)

thing, but never enough to pay the expenses of the institution that was kept up.

Q. What other States or local territory did you sell besides those you have enumerated?

A. I don't think there was money received on any others.

Q. Did you sell Missouri? A. No, sir.

Q. Did you get any money on Missouri?

A. No, sir.

Q. Well, what other States did you contract for?

Mr. McKAY.—Your Honor, it seems to me this cross-examination has gone away beyond the limit of the rule.

(Objection sustained by the Court and an exception allowed to plaintiff.)

Q. Mr. Moore, how much money did you get all together from the sale of these rights?

(Objected to by counsel for defendant.)

(Objection sustained by the Court and exception allowed to plaintiff.)

Mr. KIEFER.—Now, if your Honor please, I preserve the right to further examine this witness with regard to the time of his arrival in the city.

Q. Mr. Moore, to refresh your recollection, I show you the "Seattle Post-Intelligencer" of Sunday, December 12, 1897, and direct your attention there to an article referring to yourself. I ask you if, looking at that, you can refresh your recollection as to the time when you arrived in the city?

(Testimony of J. A. Moore.)

A. Well, that possibly may be correct, Mr. Kiefer; that says "J. A. Moore and wife, who have spent the last two weeks in Mexico, returned to Seattle, Friday. They expect to remain here."

Q. That would be Friday, December 10?

A. That might be Friday, December 10.

Q. According to that paper? A. Yes, sir.

Q. And you would not dispute that date?

A. I don't know that I would. I don't know whether this little item here is correct or not. It may be true and it may not be, I don't know.

Redirect Examination.

Q. (By Mr. GILMAN.) What, if any, other property had this corporation in addition to this formula?

Mr. KIEFER.—We object to that as irrelevant and immaterial; no pleadings which put that in issue.

Mr. GILMAN.—I thought counsel was endeavoring to make the point that he gave this money for the stock and hence there was a consideration for it.

(Objection overruled by the Court and an exception allowed to plaintiff.)

A. I don't know that there was anything. Never heard of any except it.

Q. Now, then, was it a part of the original agreement —I will ask you whether or not—that your fifth interest in this remedy should come to you through the way of

(Testimony of J. A. Moore.)

stock in a corporation organized to take over the remedy?

A. Yes. It was really all one transaction. I was to have a fifth interest in the remedy or the company or its stock. It was one and the same transaction.

Q. And it was put in the way of a corporation?

A. Yes, sir.

Q. Now, at the time you saw these people there—patients—had you any knowledge as to whether or not they had ever had the opium habit or had been cured of it?

Mr. KIEFER.—I object to that, if the Court please. That has been fully gone over in direct examination. He testified that he went down there and observed the cures and talked with the patients.

(Objection overruled by the Court and exception allowed to plaintiff.)

A. The people whom I saw there—of course I had no reason to know, no way of knowing whether they were morphine fiends or cocaine fiends, or whether they were stool pigeons, or what they were. They were a very happy lot and seemed to be having a good time.

Q. Now, then, in reference to these sales shown by the letters, etc. I will ask you what efforts you made to promote this thing and the results of your efforts; state as briefly as you can?

A. I went into the matter in absolute good faith and put a great deal of my own money into, and money that

(Testimony of J. A. Moore.)

I secured from my own family, to demonstrate the thing and make it a success. After I was convinced that it was good, or thought I was convinced of it, I put my whole energy and my money in it to make it a success, and it took nearly a year and a half or more before I gave it up feeling that I could not succeed in it.

Recross-examination.

Q. (By Mr. KIEFER.) Something I overlooked; in page 1 of this letter of March 3, 1895, you refer—this sentence occurs: "You state that you have given an option on the whole world for one hundred thousand dollars. This seems rather low when you take into consideration that it will not pay out the price of the stock lying in escrow in Seattle, and to own said stock the different shareholders would have to pay for the same out of their pockets—and the world sold." Will you explain what that letter referred to?

A. I don't know exactly, but the stock was put up in some way—I don't know where—that certain moneys coming out of this institution, or out of the operation of the company, should be paid to Bellinger and Crane as final payments for the stock. I don't think that the moneys paid or the lands given by any parties gave them the full stock. My recollection was that more money was to go out for them before there was any divided among the company; and if this deal had gone through evidently from that statement Crane and Bellinger

(Testimony of J. A. Moore.)

would have gotten all the money and we would have been in debt to them."

And defendant rested.

And thereupon plaintiff in rebuttal called GEORGE J. CRANE, who being sworn testified that he resides at Council Bluffs, Iowa; knew defendant Moore in 1893 here in Seattle; that he did not know him at the time he left Council Bluffs and had never seen him until he met him here. That Dr. F. P. Bellinger was here with him in 1893, and that together maintained an institute in this city in 1892 and 1893 for the cure of the opium, drug, liquor and tobacco habits, and that after coming here and getting the institute started he got acquainted with Moore and that Moore came to the institute many times saw the patients and talked with them, and finally became interested in the remedy; that the Bellinger German Remedy Co. was formed, that Moore took a fifth of the stock and gave his note for $5,000 at ninety days in payment for the stock, and that witness delivered the stock to Moore after the corporation was formed, and Moore delivered the note. Witness further testified that he had been associated with Mr. Bellinger actively in the promotion of this cure before the formation of the corporation; that they afforded Moore the fullest opportunity for investigation, made known and introduced to him a number of parties who had taken the cure, including the ex-chief of police of Portland, Oregon; that the negotiations covered a period of about three months.

(Testimony of George J. Crane.)

Witness further testified that after getting from Moore the original $5,000 note he mailed it to the Citizens' State Bank of Council Bluffs, Iowa, as collateral security for the indebtedness which the witness then owed the bank. That the bank was pressing him for more collateral or for payment and that he sent them this $5,000 Moore note, and that from the time he left Council Bluffs until after the note matured he did not see or have any opportunity to talk with Charles R. Hannan the cashier. He also testified that he never told him anything about what the consideration for the note was, and that the witness's daughter wrote the letter for him and the note was sent by mail. Witness further testified that he did not in anywise consent to the renewal of the note in the name of the bank and that it was renewed without his knowledge; that he knew nothing of the taking of renewal notes direct to the bank until after it was done and that he was not in Council Bluffs after mailing the note until after the note was taken direct to the bank. Witness further testified that Mr. Moore came to San Francisco after giving the original note and had an interview with witness and wanted it back saying that he had made up his mind not to go into it, and that witness told him that he had already sold it to the bank at Council Bluffs, and that he could only get it back by paying it, and that Moore finally concluded to go out and sell territorial rights, and that he engaged in that business, and that Moore refused to

(Testimony of George J. Crane.)

make any accounting to witness as general manager of the German Remedy Co. except that Moore admitted to witness that he got $5,000 for one sale. Witness further testified that Charles R. Hannan is very hostile towards the plaintiff bank and its officers, and upon cross-examination witness testified that he was president of the German American Investment Co. engaged in the buying and selling of real estate and the lending of money and that he had been released by the bank from the obligation for which the Moore note was taken as collateral but was unable to fix the date from recollection. That he had been in the life insurance business the company with which he was connected failed after witness closed his connection with it; that he had been a banker, merchant, owner of a grist mill and farmer and had dealt in agricultural implements and had been the owner of a circus for about six months. That he became interested in the Bellinger remedy about a year before he came to Seattle in 1892 or 1893; that he asked Judge Austin to try to interest some good men to make a stock company and capitalize it on this remedy; that he negotiated with Moore and presented him to the patients; told him how they cured them, and that Moore was there and saw them; that he introduced him to patients whom they had had and others who had come to this State who had been cured; that Dr. Bellinger never would tell witness what the remedy consisted of and he always claimed to witness that there was in it

(Testimony of George J. Crane.)

a secret drug obtainable only in Germany, and that he made the same claim to Moore; that he had told Mr. Moore that he and Bellinger had the only antidote for morphine known; that witness believed it and Moore could send any physicians down there, and that he told Moore they could cure disease but could not make brain. Witness further testified that he had told Moore that they had the only cure known for the morphine habit in order to get him interested and to get him to invest with them.

Mrs. Beasley, a witness on behalf of plaintiff, being sworn, testified that she was in Seattle in 1893 and is a daughter of George J. Crane, the previous witness. That Mr. Crane and Dr. Bellinger came to Seattle early in December, 1892, and remained here some four months. That she spent some time about the institute, and that she saw Mr. Moore, the defendant, about there talking with patients, and that the patients he saw were genuine patients under actual treatment, and that she was present with her father, Mr. Crane, when he delivered the defendant's stock to him; that the witness and her father sent the original Moore note for $5,000 to Council Bluffs to the Citizens' State Bank; that her father was not in Council Bluffs from the time the note was given for a considerable time, and not until after the note matured.

On cross-examination witness testified that she was 21 years of age at the time she was here with her father

(Testimony of George J. Crane.)

in 1892 and 1893, and that her father and Dr. Bellinger were trying to sell this remedy to other people also.

GEORGE J. CRANE, being recalled, the plaintiff offered to show by the witness on the stand that after the bank received the $5,000 original Moore note as collateral security for the obligation of witness to the Citizens' State Bank, the Citizens' State Bank, the then holder of this original note, without the knowledge or consent of the witness, extended the time of payment of said note at the request of defendant Moore, and then subsequently took the note of defendant Moore direct to the Citizens' State Bank without the consent of the witness on the stand, and that thereupon the witness claimed to be released from his obligation to the bank, and the bank released him in pursuance of that, to which offer the defendant objected as follows:

"Mr. GILMAN.—I don't see how that affects this defense, and I object to it"; which objection was sustained by the Court and exception allowed to the plaintiff.

Thereupon the plaintiff introduced the deposition of T. G. TURNER, a witness on behalf of the plaintiff, taken in January, 1904, as follows:

Q. What, if any, knowledge, Mr. Turner, have you of the original note executed by Mr. Moore having been renewed and other notes taken and interest paid on the original note?

(Deposition of T. G. Turner.)

A. The notes have been renewed from time to time and some interest was paid thereon.

Q. What, if any, objection did Mr. Moore ever make as to the consideration for his note?

A. He never made any objection.

Q. Mr. Turner, the original note, as I understand it, was payable directly to George J. Crane, was it not?

A. Yes, sir, I think it was.

Q. State now what, if any, change in the form of the note was made by the renewal?

A. The renewal notes were taken to the Citizens' State Bank.

Q. What note do you mean when you refer to the Crane note, Mr. Turner, as taken up?

A. The note which was owing to the bank and which we held the collateral security of Mr. Moore on.

Q. That is, the notes that were made to the Citizens' State Bank were to be held by the bank as collateral to the indebtedness owned by Mr. Crane to the bank?

A. Yes, sir.

Q. Mr. Turner, what has been the attitude of Mr. Hannan while he was connected with the Citizens' State Bank or the First National Bank with reference to enforcing the collection of the notes in suit against Mr. Moore, the defendant?

A. He has been waiting, or always waiting for a time to come when he could collect from Mr. Moore.

Q. When you say that, Mr. Turner, do I understand you to mean that he was waiting for such a time as that

(Deposition of T. G. Turner.)

Mr. Moore would financially able to meet the notes or not?

A. That was the only question, that whenever Mr. Moore was financially responsible the suit would be commenced at once.

Q. Mr. Turner, when did Charles R. Hannan retire from the First National Bank—about when?

A. The latter part of January, 1902.

Q. What has been his attitude toward the bank or officers of the bank, and especially towards the president of the bank, Ernest E. Hart, since the date of his retirement?

A. He has apparently had it in for the bank and for Mr. Hart especially, trying in every way to injure the bank and Mr. Hart.

Q. What, if anything, did Mr. Hannan ever say to you, or in your presence to anyone else, as to the notes sued upon being tainted with fraud, or anything of that character?

A. He never intimated to me in any way that the notes were obtained by fraud or tainted with fraud.

Q. What, if any, claim did Mr. Hannan ever make to you, or in your presence to another, that the note was without any consideration or tainted with fraud?

A. He always claimed that the note was given for consideration, and that the only question was Mr. Moore's inability to pay.

Thereupon the plaintiff offered in evidence the deposition of Dr. F. P. BELLINGER taken February 4, 1903, on behalf of the plaintiff by stipulation between counsel:

Q. State whether or not you entered into a contract with the defendant J. A. Moore to compound and furnish medicines for Bellinger's German Remedy Company according to the secret formula known to Dr. F. P. Bellinger, and if so, state whether or not said contract was oral or in writing.

A. No such contract was ever made with the defendant J. A. Moore. When the Bellinger German Remedy Co. was incorporated and organized it was understood that I was to be the medical director of the company, and afterwards I became medical director, and as such medical director it was my duty to compound the medicines under such formula.

Q. If you have answered that you have entered into a contract with the defendant J. A. Moore to compound medicines for the Bellinger German Remedy Co. according to the secret formula known to Dr. F. P. Bellinger, and have testified that the said contract was entered into orally, state exactly and in detail what said contract was, setting out fully its terms and conditions, and if you have answered that it was in writing, annex to your answer hereto a copy of said contract as a part of your answer, and identify the said copy of said contract as a part of your answer, and identify the said copy by your initials written thereon, and by the initials

(Deposition of F. P. Bellinger.)

of the notary public before whom your deposition is taken.

A. As I said before, no contract, either oral or written, was ever made with J. A. Moore.

Q. If you have testified that you entered into a contract with the defendant J. A. Moore to compound and furnish medicines according to the secret formula known to Dr. F. P. Bellinger for the Bellinger German Remedy Co., state whether or not you furnished the medicines required by said contract, and state generally what you did in the execution and performance of said contract.

A. I never contracted with J. A. Moore to compound and furnish according to the secret formula, but as an officer of the Bellinger German Remedy Co. it was one of my duties to compound and furnish medicines upon payment to me of the cost price of same.

Q. State fully each and all and everything that you did in the execution and performance of said agreement, a copy of which you have annexed to your deposition heretofore given herein on October 13th, 1902, setting out specifically and generally each and everything that you did in the execution and performance of said contract.

A. Under the terms of the contract Mr. Crane and I were to sell to the said corporation the secret formula, receipts and prescriptions otherwise known as the German Remedy Co. and the exclusive right to compound, manufacture, use, vend and sell and deliver the same

(Deposition of F. P. Bellinger.)

prior to the delivery of the stock to Mr. Crane and me, I delivered to the said corporation the written formula and receipt for the manufacture of that remedy.

Q. You have heretofore testified in answer to interrogatories propounded to you on the 13th day of October, 1902, that the consideration of the original note, of which the notes herein sued upon are renewals, was 2,000 shares of the capital stock of the Bellinger German Remedy Co. of Seattle, Washington; please state whether or not there was any other or further consideration from yourself or the said Dr. Bellinger to said J. A. Moore for said note, and if so, state specifically what said consideration was?

A. There was no other consideration.

Q. If you have testified in answer to the preceding interrogatory that there was any other or further consideration than the said 2,000 shares of stock in said company, state specifically, fully and in detail, what, if anything, you did or the said Dr. Bellinger did in the execution of or the delivery of said consideration and performance of said consideration?

A. There was no other consideration. We performed said condition.

Q. State whether or not you were the owner of the secret formula or recipe or prescription for making medicines or remedies for the cure of the morphine, cocaine, opium, chloral, liquor and tobacco habits, with the sole right to use the said formula, recipe or pre-

(Deposition of F. P. Bellinger.)

scription throughout the world, in the month of March, 1893?

A. Mr. Crane and I owned together the secret formula or recipe for making such medicines in March, 1893.

Q. State whether or not you or the Bellinger German Remedy Co., of Seattle, Washington, ever had a safe deposit box in the safe deposit vaults of the Seattle Trust and Safe Deposit Co., underneath the Merchants' National Bank in Seattle, Washington?

A. The Bellinger German Remedy Co. of Seattle, Washington, had a safe deposit box in the Seattle Trust and Safe Deposit Co.

Q. If you answer that you or the said Bellinger German Remedy Co., of Seattle, Washington, had a safe deposit box in the place mentioned in the preceding interrogatory, state whether or not you ever placed in said safe deposit box the secret formula of Dr. F. P. Bellinger, for making and compounding and preparing the medicines to be used by the Bellinger German Remedy Co., of Seattle, Washington, or the medicines referred to in the contract between yourself and Dr. Bellinger as parties of the first part and the Bellinger German Remedy Co.?

A. I placed in the said safe deposit box the secret formula referred to, under an arrangement with the Bellinger German Remedy Co.

Q. If you answer that you placed said formula in said safe deposit box, state whether you ever removed

(Deposition of F. P. Bellinger.)

the same, and if so, when and under what circumstances? A. I never did remove it.

Q. If you have answered that you placed said formula in said safe deposit box, answer who had access to said box and with whom the key was left?

A. The key was left with the person in charge of said safety box, and J. A. Moore also had access to said box.

Q. Do you know where at the present time said formula is, or what became of it at any time?

A. No, I do not.

Cross-Interrogatories.

Q. Did you ever have a secret or other formula for the cure of the morphine, cocaine, opium, chloral, liquor and tobacco habits or either of said habits?

A. I did.

Q. If you answer yes to interrogatory No. 1, then you may state whether you are the author or discoverer of said formula, and whether or not the same is known to any other person except yourself?

A. I was the author and discoverer of the same. No one else but myself knew said secret formula in March, 1893, and at said time, in connection with George J. Crane, was the sole and only owner of same, but Crane did not have any knowledge of the contents of said formula. I cannot say whether anybody else since then has become acquainted with it. I know that I never gave it to any one.

(Deposition of F. P. Bellinger.)

Q. State the contents of said formula?

A. I refuse to answer cross-interrogatory No. 3, because under my contract with the Bellinger German Remedy Co. I have no right to disclose the contents of said formula to anyone, because the value of said formula consists in the knowledge of its contents, and if I should make public the contents of said formula, it would destroy the value of said formula to the Bellinger German Remedy Co.

Q. Did you deliver the said formula to the Bellinger German Remedy Co., of Seattle? If so, when and to which officer of said company?

A. I delivered said formula to myself as medical director of the Bellinger German Remedy Co., and by order of the officers of said corporation I deposited the same in the safety deposit box of said Bellinger German Remedy Co., in the Seattle Trust and Safe Deposit Co.

Q. If you say that you deposited the said formula in the vaults of the Seattle Trust and Safe Deposit Co., state whether you ever removed or aided in the removal of the said formula from said vaults?

A. I never did, nor aided anyone in removing the same.

Q. Do you know what became of said formula? If so state what became of it?

A. I do not, but I have complete and thorough knowledge of all the contents of said formula and can

(Deposition of F. P. Bellinger.)

give the said formula in writing to the Bellinger German Remedy Co. if desired.

Q. State what communication has passed between between you and the attorney for the plaintiff in this action in regard to your testimony?

A. None whatever.

Plaintiff offers in evidence the deposition of F. A. BUCKMAN:

Q. State your name, age, place of residence and occupation.

A. My name is F. A. Buckman. Age, 38. Place of residence, Council Bluffs, Iowa. Occupation, assistant cashier of the First National Bank of Council Bluffs.

Q. State what position, if any, you held or occupied in the Citizens' State Bank of Council Bluffs, Iowa, in the months of December, 1896, and January, 1897?

A. Discount clerk.

Q. State whether or not as an officer, agent or employee of said Citizens' State Bank of Council Bluffs, Iowa, you had any correspondence with the defendant J. A. Moore, during the months of December, 1896, and January, 1897, or at any other time respecting three certain notes made by said defendant to said Citizens' State Bank of Council Bluffs, Iowa, dated January 2, 1897, two for $2,500 each and one for $800, and if you say in answer to this interrogatory that you had such correspondence annex to this deposition as a part of

(Deposition of F. A. Buckman.)

your answer hereto copies of all letters written by you to said bank?

A. I do not find any correspondence with the defendant J. A. Moore, during the months of December, 1896, and January, 1897, but in the letter-book of the bank under date of October 30th, 1896, I find a letter written by myself and signed C. R. Hannan, said signature having been signed by me under authority from Mr. Hannan. This letter is in words and figures following, to wit:

Oct. 30, 1896.

J. A. Moore, Chihuahua, Mexico.
Dear Sir,

Please find herewith for your signature three notes, two of $2,500 each and one of $700. The latter is made up of interest July 1 to Oct. 30, on the $5,000, and the $545 note, with interest, from June 1 to July 1. If you will sign these and return will return old notes to you at once.

Respy,

C. R. HANNAN.

The original of the above letter was placed in an envelope and the envelope properly stamped and addressed to Mr. Moore and mailed to him at the address mentioned in the letter.

In the same letter-book and of date of November 14th, 1896, is a typewritten letter addressed to J. A. Moore, which said letter was dictated by me as one of my

(Deposition of F. A. Buckman.)

regular duties in the bank but signed by Chas. R. Hannan, the then cashier of the bank. This letter is in words and figures following, to wit:

Nov. 14, 1896.

J. A. Moore, Esq., Room 45, Bank Building, Denver, Colo.

Dear Sir,

We are in receipt of your favor of the 6th inst., enclosing new notes and beg to return you herewith your two old notes dated Jan. 1, for $2,500 each, also interest note of $545, dated Jan. 1st, 1896. I note that you say you are to be in Denver. I sincerely hope it may be your good fortune to get into possession of money enough to take up the interest note we now hold and the others as rapidly as possible. Be kind enough to help me out in this matter as I have personally vouched for you in the matter and it is becoming quite embarrassing to me because our people are complaining and saying that I should have enforced collection on this paper a long time ago. Be kind enough to give this matter your best and immediate attention and the same will be appreciated.

Yours truly,

CHAS. R. HANNAN.

The original of the letter above set forth was placed in an envelope, sealed and the envelope stamped and properly addressed according to the address mentioned in the letter above and the same mailed in the postoffice

(Deposition of F. A. Buckman.)

in Council Bluffs, Iowa. Neither of these letters were ever returned to the bank of the postoffice department. I find no other correspondence relative to these notes in the files of the bank or in the letter-books of the bank.

Q. If you testify in answer to the foregoing interrogatories that you had correspondence with the defendant J. A. Moore respecting the said notes dated January 2, 1897, one for $2,500, another for $2,500, and another for $800, payable to the Citizens' State Bank of Council Bluffs, Iowa, state whether or not the defendant J. A. Moore sent said notes to said bank by mail and whether there was accompanying them a letter, and if you answer that said notes were accompanied by a letter state whether or not you saw and read such letter at the time or at any other time, and state also whether you have made search for such letter; state whether you have found such letter and whether it is in existence to the best of your knowledge?

A. At the time referred to in the interrogatory it was part of my duties in the bank to open the mail. I remember receiving the notes in question, together with a letter accompanying same, and I have made diligent search therefor in all places in the bank where such letter would be kept and have been unable to find the same. When the Citizens' State Bank was turned over and reorganized into the First National Bank, a large amount of correspondence deemed unimportant, and a large number of the old letter-books of the Citizens'

(Deposition of F. A. Buckman.)

State Bank were destroyed, and this letter was undoubtedly among those letters destroyed at that time.

And thereupon the Court adjourned until 10 A. M. February 2, 1906, and on February 2, 1906, the following proceedings were had: The plaintiff read in evidence from the deposition of the witness Gleason:

"Q. What has been the feeling of Charles R. Hannan towards the plaintiff herein since he ceased his connection with the plaintiff?

A. Mr. Hannan has been hostile to the interests of the bank."

And plaintiff read the following interrogatory and answer from the deposition of the witness Weis:

"Q. What has been the feeling of Charles R. Hannan towards the plaintiff herein since he ceased his connection with the plaintiff, and what, if anything, do you know of expressions of ill-will or hostility towards the plaintiff on the part of Charles R. Hannan?

A. I know there has been ill-feeling on the part of Hannan towards the plaintiff, but I do not know much about this, and I never heard Hannan make any expression of ill-will or hostility."

J. A. MOORE, being recalled for further cross-examination by the plaintiff, testified in substance as follows: That Mrs. Moore was absent with him from this city in 1897, and that at that time Moore had no residence or house or place of abode in this city and his furniture had been stored, and that he returned to this

(Testimony of George J. Crane.)

city some few weeks before he went to board with Mr. McAllister in December, and that the best of witness' recollection was that he returned to the city about the middle of November, 1897.

GEORGE J. CRANE was thereupon recalled by the plaintiff, and the plaintiff's counsel made this offer of testimony to prove by the witness on the stand that when he learned of the bank (Citizens' State Bank) having accepted the note direct from Moore in lieu of one delivered to the bank by him as collateral security, the original $5,000 note, he objected to the action of the bank, and demanded to be released, and that the bank did release him—released him personally and all his property except the Moore note, and agreed to look wholly to the Moore note for the indebtedness for which it had been given as collateral, and that this was done as soon as witness learned from Moore in 1893, of the acceptance of his note direct to the bank, and that it was after the maturity of the original note; to which offer the defendant objected, which objection was sustained by the Court, and exception allowed to the plaintiff.

The plaintiff thereupon rested its rebuttal, and the defendant in sur-rebuttal, took the sand in his own behalf and testified that Dr. Bellinger was the only man who had access to the safe deposit box, and that no person else was allowed to interfere with that in any way as long as he lived.

Thereupon the defendant offered in evidence the deposition of CHARLES R. HANNAN, taken January 25, 1906, as follows:

Q. When and how did you learn that T. G. Turner had signed your name to a written assignment of the notes made by the defendant?

A. I was advised by someone about the time I made my deposition while at Detroit in 1904, that Mr. Turner had signed my name as cashier of the Citizens' State Bank, my best recollection being that my name was signed per T. G. Turner. I don't remember who told me. This is all I then learned.

Q. Did you learn that your name had been signed to said assignment before the commencement of this action? A. No.

Q. Where were you at the time you learned that your name had been signed to said assignment and where was the said T. G. Turner?

A. I was stopping in Detroit, Michigan, engaged in building a railroad between Detroit, Michigan, and Toledo, Ohio. So far as I know Turner was in Council Bluffs, Iowa.

Q. After you learned that your name had been signed to said assignment did you ever meet or have any conversation with the said T. G. Turner?

A. Yes. I am still maintaining my residence at Council Bluffs, Iowa, where I am keeping my house open, same being occupied by a brother in law who is to step out any time I return. While at Detroit in

(Deposition of Charles R. Hannan.)

1904, I was only there temporarily engaged in constructing a railroad, and am now located in Boston temporarily. I go back to Council Bluffs occasionally to look after my interests there, and Mr. Turner being a brother in law, have called on him at his house and he has called on me at my home, but the matter in question was never referred to by either one of us.

Q. If you say yes to the foregoing question state whether anything was said about your name having been signed to said assignment; and if so, state what was said?

A. Nothing was said. I adopt my answer to Number 4 as an answer also to this question.

Testimony closed.

The plaintiff then moved the Court to instruct the jury to render a verdict in favor of the plaintiff upon the ground that the defendant has not pleaded any defense in his answer; that it appears from the defendant's testimony that the original note for $5,000 given by Mr. Moore in March, 1893, was turned over by the Citizens' State Bank, the assignor of the plaintiff, before maturity, as collateral security for a debt of Crane to the Citizens' State Bank, and that at that time Mr. Hannan, the cashier, who acted on behalf of the Citizens' State Bank, did not know of any failure of consideration, or of any infirmity in the consideration; and on the further ground that the defendant has shown that the original note for $5,000 above mentioned, of

which the notes in suit are successors, was taken by the Citizens' State Bank, plaintiff's assignor, as collateral security for a debt which is still existing and unpaid, and that the same was acquired subsequently by the Citizens' State Bank by novation by the defendant J. A. Moore executing to the Citizens' State Bank a note or notes for $5,000 upon the maturity of the first note, upon the consideration of an extension of time, as testified to by him; and upon the further ground that it appears that the consideration for the original $5,000 note made in March, 1893, was the purchase of 20,000 shares of stock in the Bellinger German Remedy Co., a corporation under the laws of the State of Washington; and that the defendant has neither pleaded nor proved, nor offered any rescission of the contract, and it appears that he received his stock and has not rescinded, and the only contract for the turning over of Bellinger's cure was a written contract for turning over to the Bellinger German Remedy Co., a corporation, and that the defendant cannot avail himself of any alleged breach of that contract, and that all prior negotiations were merged into that contract, and that any breach thereof would give rise to a cause of action in favor of that company and not in favor of this defendant; and upon the further ground that the defendant has shown that he received some consideration for the note, received a partial consideration, that at the most there was only a partial failure of consideration, and he cannot prove that except on pleading the partial failure by way of counterclaim, which he has not done in this case;

which motion the Court denied and plaintiff excepted and exception allowed.

The plaintiff in writing requested the Court to instruct the jury as follows:

1. Under all the law and evidence in the case the jury are instructed to return a verdict in favor of the plaintiff for the full amount of the notes pleaded in plaintiff's amended complaint, with interest from date at the amount stipulated therein, to wit, eight per cent per annum to be compounded semi-annually.

2. The jury are instructed that the burden of proof is upon the defendant to prove by preponderance of evidence in the case the defenses alleged by him in his answer herein.

3. The jury are instructed that the defendant has not made out the defense of the statute of limitations and the jury will not consider the same.

4. If the jury find from the evidence that when the Citizens' State Bank of Council Bluffs, Iowa, received the note made by the defendant for $5,000 in favor of George J. Crane in March, 1893, the officers of the said bank knew of nothing to apprise them or put them upon inquiry that the said note was given without consideration or procured by fraud, the verdict of the jury will be for the plaintiff for the full amount sued for.

5. If the jury find from the evidence that the defendant in making said contract with George J. Crane and F. P. Bellinger in March, 1893, for the purchase of stock in the Bellinger German Remedy Co., for which said $5,000 note was given, relied upon his own investi-

gation of the merits of the alleged cure for the liquor, drug and tobacco habits, then no defense has been made out in this case, and the verdict should be for the plaintiff for the full amount of the plaintiff's claim.

6. If the jury find from the evidence that the contract of F. P. Bellinger and George J. Crane for the transfer of the Bellinger remedy for the liquor, drug and tobacco habits, was made with the Bellinger German Remedy Co., a corporation, then the defendant has not made out his defense and the verdict must be for the plaintiff for the full amount claimed.

7. If the jury find from the evidence that F. P. Bellinger and George J. Crane, in March, 1893, honestly believed that said Bellinger possessed a cure or remedy for liquor, drug and tobacco habits, and their experience with the use of the same led them to believe that the same was a good cure, and they honestly represented to the defendant that it was a good cure, the failure of such cure to work perfectly after long trial would be no defense to the defendant in this action.

8. The defendant cannot set up the failure of Bellinger's cure for the liquor, drug and tobacco habits to work out as he expected, unless in making the contract for the purchase of stock in the Bellinger German Remedy Co., he replied wholly and entirely upon the representation of Crane and Bellinger that the said cure was a success.

9. If the jury find from the evidence that Crane and Bellinger honestly believed that they had a good and successful cure for the liquor, drug and tobacco habits

in March, 1893, and in good faith, believing in said cure, organized a corporation known as the Bellinger German Remedy Co. and sold to the defendant one-fifth of the stock of said corporation for his said note for $5,000, although it eventually turned out that said cure could not be made a medical and commercial success, the failure of the same to prove a medical and commercial success would not afford any defense to the defendant, and the verdict of the jury should be for the plaintiff for the full amount sued for.

10. The jury are instructed that if the defendant, J. A. Moore, after learning that the said remedy for the cure of liquor, drug and tobacco habits was not a success and could not be made profitable, made the notes in suit to the Citizens' State Bank, he cannot now plead that the said cure was not a good cure, or that there was no cure, or that he was defrauded or inveigled into giving the original note.

And thereupon the Court instructed the jury as follows:

"Gentlemen of the Jury: This is an action against the defendant, James A. Moore, to recover the amount due upon three promissory notes. When I use the word 'due' I do not mean to say there is anything due on these notes, but in connection with what else I have to say you will understand by that phrase is meant the amount a computation of the principal and interest would bring.

The defendant has admitted the execution and delivery of these notes and that constitutes prima facie a right in the owner of the notes to recover against him;

that is, it is a prima facie obligation on his part to pay what he promised to pay to whoever is lawfully entitled to collect it.

The defendant, however, has made in a defense in the action on the ground that the notes were given without lawful consideration and created no obligation on his part to pay them when they were given, because they were given as a renewal of a previous debt created by a promissory note, and that in the original transaction in which the first note was given there was fraud and deceit practiced upon him and the note was obtained from him by fraud and deceit and without any valuable consideration.

The burden of proof is upon the defendant to establish that, and if that defense is established then the inquiry comes with respect to the right of the plaintiff in the action, who not being connected with the original transaction, claims rights based upon certain principles of law relating to commercial paper which protect it from such a defense which is only available to the defendant against parties in the same relative position which the original payees of the note held.

If the defendant was induced to give the five thousand dollar note by representations which were made to him by the payees, Bellinger and Crane, and the note would not have been given if those representations had not been made and believed and relied upon by the defendant, and if those representations were known at the time by the payees to be false and untrue and were made for the purpose of victimizing the defendant, or

swindling him, then there would be no lawful consideration for the note and it would be void as an obligation in the hands of the payees, and it would also be void in the hands of any transferee who at the time of receiving the note had knowledge that it has been obtained by trickery and fraud. These are the principles that must govern you in determining the rights of the parties to the present action.

The plaintiff in the case is the successor and assignee of the bank to which the notes were given, which was the transferee of the original notes. Now, the plaintiff in this action occupies exactly the same situation that the bank taking the first note from the payees occupied. If the obligation was void in the hands of the first transferee it is void in the hands of the plaintiff.

The jury are instructed that the burden of proof is upon the defendant to prove by a preponderance of the evidence in the case that the defense alleged by him in his answer herein.

The jury are instructed that the defendant has not made out the defense based upon the statute of limitations and the jury will not consider the same. That is one of the special defenses set up in the answer, that the action is barred by the statute of limitations, but there has been a failure of proof, so the jury will not have to consider that question.

If the jury find from the evidence that when the Citizens' State Bank of Council Bluffs, Iowa, received the note made by the defendant for five thousand dollars in favor of George J. Crane in March, 1893, the officers

of said bank knew of nothing to apprise them or put them upon inquiry with respect to the claim now made by the defendant that the note was given without consideration or procured by fraud, the verdict of the jury will be for the plaintiff for the full amount sued for.

Now, gentlemen of the jury, there is a question in the case as to which there is a conflict of testimony, and it is referred to the jury to decide what the truth about it is, whether there was knowledge on the part of the cashier, or whoever acted for the Citizens' State Bank of Council Bluffs at the time of receiving that five thousand dollar note. It is shown by uncontradicted evidence that the transaction was through Mr. Hannan, who was an officer of that bank at that time, and whose deposition has been taken in this case. Mr. Hannan will be presumed, as the result of the uncontradicted testimony in the case, to have been authorized to act for the bank in that matter, and any knowledge or information which he had on the subject is to be imputed to his principal, the bank for which he was acting, and the jury must determine this question of whether he knew of the fact that Mr. Moore had been swindled (if in fact he was swindled) in the transaction by which the note was obtained by him.

In determining that question you are to consider all the facts and circumstances attending the transaction and showing what knowledge Mr. Hannan did have in regard to the maker and the payees of the note and in regard to their dealings together with respect to that note and the circumstances under which the note was

obtained, and determine from a consideration of the testimony whether the evidence shows that Mr. Hannan did know of enough of the transaction to have put a prudent man on inquiry before accepting the note as a purchaser of it in good faith. The bank is chargeable not only with the knowledge which Mr. Hannan actually did have, but if there was some knowledge on his part which should have been a warning to him and would have caused a prudent business man to have made inquiry, then the bank is chargeable with all the knowledge that might have been obtained by an inquiry, and if there was a swindle practiced, and the bank, through Mr. Hannan, knew it or should have known it, then the note was equally void in the hands of that bank as in the hands of Crane and Bellinger, and if void in the hands of the Citizens' National Bank it is likewise void in the hands of the plaintiff bank.

(Defendant 1.)

I charge you that if the original note given by the defendant in this case to George J. Crane was without consideration and was obtained by said Crane from the defendant by false and fraudulent representations made by said Crane or his associate, Bellinger, to the defendant, and that the defendant signed said note relying upon such representations and believing them to be true then said note was invalid in the hands of Crane and Bellinger, or either of them, and they would have no right to recover from the defendant thereon.

(Defendant 2.)

I charge you that if said Crane and Bellinger, or either of them, represented to the defendant that they or either of them owned a secret formula from which a medicine could be compounded that was a specific for and would cure the morphine, cocaine, liquor and tobacco habits, and if said representations were made for the purpose of inducing the defendant to sign said original note in order to purchase an interest in said formula, and if the defendant, relying upon said representations and believing them to be true, and so relying and believing, signed said original note, and if, as a matter of fact, said defendants did not own or possess any such formula, or if the formula so claimed to be possessed by them was not a specific or cure for said habits and the said Crane and Bellinger, or either of them, knew that they possessed no such formula, or knew that any formula owned or possessed by them was not a specific or cure for said habits, then I charge you that such action on the part of Crane and Bellinger would amount to fraudulent misrepresentation and said note would be without consideration and void in the hands of Crane and Bellinger.

(Defendant 3.)

I charge you that if said note was obtained by said Crane and Bellinger, or either of them, from the defendant without consideration, and by false and fraudulent representations, and the Citizens' State Bank had notice or knowledge of said fraud and lack of considera-

tion at the time said note was transferred to it, then the rights of said bank in this note would be no greater than those of Crane and Bellinger, and under such circumstances said bank could not recover thereon.

(Defendant 4.)

I charge you that notice or knowledge on the part of a cashier of a bank who acts for it in a transaction is in law notice or knowledge to the bank itself.

(Defendant 5.)

The plaintiff sues as the assignee of the notes in controversy and it has no other or greater rights than the assignor, the Citizens' State Bank, and if said State Bank could not recover then plaintiff cannot recover.

(Defendant 6.)

I charge you that if you shall find under the instructions that I have heretofore given that the original note was fraudulent and without consideration in its inception and that at the time of its transfer to the Citizens' State Bank this fact was known by that bank or by its cashier who acted for it in the purchase of the same, and that the renewal notes which are the subject of the suit in this action were executed by the defendant without notice of the original fraud, if any, practiced on him, or if said renewals were obtained from the defendant by the false and fraudulent representations made by said bank, or its cashier, to the defendant, to the effect that said note had been acquired for value without notice in

due course of business, then I instruct you that your verdict must be for the defendant.

To make this last statement of the law clear and accurate it is necessary for me to state to you the converse of the proposition, and that is this: that if Mr. Moore, the defendant, before executing these renewal notes, these notes that are now sued on, had become fully informed and had knowledge of the truth or falsity of the representations made to him by Crane and Bellinger when he gave the original note, and also had true knowledge with respect to the manner in which the Citizens' State Bank had acquired that note and the facts upon which the rights of the bank to require him to pay that note depended, and in the light of full information and knowledge had recognized an obligation to pay the note and had executed these notes sued on in acknowledgment of that obligation, then he is liable on these notes irrespective of the question whether there was fraud in the original transaction or not and your verdict should be for the plaintiff in the case, if you find that Mr. Moore did execute these notes in consideration for a supposed liability, if he acted in the light of knowledge and was not deceived by false representations made to him as to the manner in which the Citizens' State Bank came into possession of the original note.

In this connection I should tell you that the letters of the defendant Moore which have been introduced in evidence as tending to prove an acknowledgment on his part, or an admission on his part, of liability to pay the debt, are to be considered in the same manner. They

are not admissions binding him, if at the time they were written he was ignorant of the fact that he had been victimized and swindled. Of course you take a statement of that kind from me always as qualified by this, that the question is referred to you to decide whether he was victimized and swindled. I am not telling you that he was; I have no right to tell you that.

In the progress of the trial and in the discussion of the case a claim has been made that there was a new liability created by novation. The Court instructs you that there was not any liability created by novation. A novation is a contract that requires three parties and the minds of all three must meet and be in accord so as to effect a novation. That would occur in a case in which we will say A (supposing that to represent a person) is indebted to B and B is indebted to C and they all agree that A shall become liable to C for the debt of B and B releases A from any further obligation to him and C accepts A in the place of B and releases B from any obligation to him. That constitutes a novation. You see it requires the concord of three minds.

(Defendant 7.)

I charge you that if you shall find from the evidence that said note was fraudulent and without consideration in its inception, then the burden of proof is upon the plaintiff to establish by preponderance of evidence that the Citizens' State Bank was a bona fide holder of said note, and if you shall find from the evidence that the said note was fraudulent and without consideration

in its inception, and shall further find that the plaintiff has not established by a preponderance of the evidence that the same was taken in due course of business without notice of such fraud, then your verdict must be for the defendant.

In the progress of the trial there has been some discussion as to whether receiving the five thousand dollar note merely as collateral security for a previously existing indebtedness of Crane to the bank without any agreement changing the relationship between the bank and Crane by extending him further time to pay his debt or forbearing to enforce payment, as to whether that would constitute a receipt of the note in the due course of business, which would entitle the bank to the right of a bona fide holder. The Court instructs you that without having to determine any questions in that matter upon the evidence, it is to be taken as a fact that the bank received the note and gave a consideration sufficient to make a binding contract and entitle it to the rights of a bona fide holder and to enforce payment against the maker, provided it was unstained by knowledge of fraud in the obtaining of the note originally—as a mere question of consideration the Court tells you that there was sufficient consideration.

If your verdict shall be for the plaintiff you will take the notes and compute the amount that is now due, including principal and interest at the rate specified in the notes, that is, simple interest up to the present time.

The Court submits two forms of verdict. If your verdict is for the plaintiff you will complete what is writ-

ten by inserting the amount in money that you award as damages; if your verdict is for the defendant your foreman will sign the other one which reads, "We, the jury, in the above-entitled cause find for the defendant."

The pleadings which go to the jury include this amended complaint and the answer which is in this volume. I will put these other papers in here to mark the place where that answer is and the amended reply. It will not be necessary for you, gentlemen, to try to study out what is in these other papers. The only paper which you may have occasion to refer to is the answer which I have marked here. The jury may retire."

And the jury having retired to consider their verdict the plaintiff, in accordance with Rule 58 of this court, as follows:

Rule 58. Exceptions to a Charge. Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the Court, after the jury have retired to consider of their verdict, and if practicable before the verdict has been returned, that such party excepts to the same, specifying by numbers of paragraphs or in any other convenient manner the parts of the charge excepted to, and the requested instructions, the refusal to give which is excepted to; whereupon the Judge shall note such exceptions in the minutes of the trial or cause the reporter (if one is in attendance) so to note the same"; excepted to the refusal of the Court to give to the jury the instruction

requested by plaintiff in writing before the beginning of the argument to the jury, numbered 1, 5, 6, 7, 8, 9 and 10, and to the giving of the first, second, third, fourth, fifth, sixth and seventh instructions as requested by the defendant.

Plaintiff also excepted to the instructions given by the Court that the plaintiff occupies the same position to these notes as the Citizens' State Bank, and also to the instruction to the effect that any knowledge of Hannan, or any information which he might have, which would put a prudent man upon inquiry, was to be imputed to the bank and considered the knowledge of the bank so far as anything which might have been found out by inquiry goes; and plaintiff also excepted to the instructions given by the Court that there was no consideration for the renewal note.

Plaintiff also excepted to the instruction to the effect that the defendant Moore had a right to rely upon any representations made to him by Crane and Bellinger if false representations were made and he believed them, that he had a right to rely upon them and that such representations would constitute a defense.

Plaintiff also excepted to the Court's instruction that there was no novation.

And the jury afterward came into court and returned a verdict in which they said they found for the defendant, and thereupon the plaintiff moved for judgment in favor of the plaintiff for the full amount of the notes pleaded in its amended complaint notwithstanding the verdict, which motion was by the Court after argument

of counsel denied, and the plaintiff excepted and exception allowed to plaintiff; and thereupon the plaintiff presented a petition for new trial, which petition was by the Court denied, and plaintiff excepted.

And thereupon on the 5th day of March, 1906, the Court, upon motion of the defendant, rendered a judgment herein that the plaintiff take nothing by its action, and that the defendant recover his costs and disbursements to be taxed, to which judgment plaintiff excepted and exception allowed.

Order Settling Bill of Exceptions.

In this cause the Court having heretofore on a day of the November, 1905, term of the United States Circuit Court for the Western District of Washington, by order duly made, extended the time for proposing and settling bill of exceptions to the 17th day of March, 1906 and the Court having, for cause shown on the 14th day of March, 1906, extended the time for proposing and settling the bill of exceptions up to and including the 31st day of March, 1906, the same being a day of the November, 1905, term, both said orders being made in open court upon the consent of counsel for both parties; and this cause having come on to be heard upon the bill of exceptions as proposed by the plaintiff, and the plaintiff appearing by James Kiefer and James McNeny, its attorneys, and the defendant by L. C. Gilman and M. M. Lyter, his attorneys:

It is by the Court ordered that the foregoing bill of exceptions be, and the same is hereby, settled, allowed and made a part of the record herein.

And it is hereby certified that the foregoing bill of exceptions contains all the testimony in substance taken and admitted upon the trial of said cause, counsel for both parties appearing in open court and waiving formal notice of filing bill of exceptions and the time and place of settling same.

Dated March 30th, 1906, a day of the November, 1905, term.

C. H. HANFORD,
Judge.

[Endorsed]: Bill of Exceptions. Settled and filed in the U. S. Circuit Court, Western Dist. of Washington. Mar. 30, 1906. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

In the Circuit Court of the United States, in and for the Western District of Washington.

FIRST NATIONAL BANK OF COUNCIL BLUFFS, IOWA,
Plaintiff,
vs.
J. A. MOORE,
Defendant.
} No. 1128.

Petition for Order Allowing Writ of Error.

The First National Bank of Council Bluffs, Iowa, a banking association, duly organized and existing under and by virtue of the acts of Congress of the United States respecting banking associations, plaintiff in the

above-entitled cause, deeming itself aggrieved by the verdict of the jury entered on the 2d day of February, 1906, and the judgment entered on the 5th day of March, 1906, in pursuance of said verdict, whereby it is considered, ordered and adjudged that the defendant do recover of and from the plaintiff his costs and disbursements, and that the plaintiff take nothing by its action herein, and that plaintiff's action and complaint herein be dismissed:

Comes now by James Kiefer and James McNeny, its attorneys, and prays said Court for an order allowing said plaintiff to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the plaintiff shall give and furnish upon said writ of error, and that, upon the giving of said security, all further proceedings in this court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit, and your petitioner will ever pray.

JAMES McNENY,
Attorneys for Plaintiff.
JAMES KIEFER,

[Endorsed]: Petition for Order Allowing Writ of Error. Filed in the U. S. Circuit Court, Western Dist. of Washington. Mar. 22, 1906. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

In the Circuit Court of the United States, in and for the Western District of Washington.

FIRST NATIONAL BANK OF COUNCIL BLUFFS, IOWA,
Plaintiff,
vs.
J. A. MOORE,
Defendant.

No. 1128.

Order Granting Writ of Error and Fixing Amount of Bond.

This cause coming on to be heard in the courtroom of said court in the city of Seattle, Washington, upon the petition of the plaintiff filed herein for a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, together with the assignment of errors, also filed herein, within due time, it is now upon motion of James Kiefer and James McNeny, attorneys for plaintiff, ordered that a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, be allowed said plaintiff, and that the bond for costs and damages be and it is hereby fixed at two hundred and fifty dollars ($250).

And it is further ordered that all proceedings be stayed pending the determination of said writ of error.

Dated March 22, 1906.

C. H. HANFORD,
Judge.

[Endorsed]: Order Granting Writ of Error and Fixing Amount of Bond. Filed in the U. S. Circuit Court, Western Dist. of Washington. Mar. 22, 1906. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

In the United States Circuit Court of Appeals for the Ninth Circuit.

FIRST NATIONAL BANK OF COUNCIL BLUFFS, IOWA,
Plaintiff in Error,
vs.
J. A. MOORE,
Defendant in Error.

No. ——.

Assignment of Errors.

Comes now the above-named First National Bank of Council Bluffs, Iowa, plaintiff in error herein, by James Kiefer and James McNeny, its attorneys, and particularly specifies the following as the errors upon which it will rely and which it will urge upon the prosecution of its writ of error in the above-entitled cause:

I.

That the United States Circuit Court in and for the Western District of Washington, erred in overruling the objection to the plaintiff in error to the introduction of any testimony in support of the third alleged affirmative defense pleaded in the answer of the defendant.

II.

That the Court erred in overruling the objection of the plaintiff in error to the introduction of any testimony in support of the fourth alleged affirmative defense pleaded in the answer of the defendant.

III.

That the Court erred in overruling the objection of the plaintiff in error to the question propounded to the witness Moore upon the stand as follows:

"Q. Now, I will ask you if you subsequently entered into any business transactions with Bellinger and Crane with reference to acquiring the formula for this remedy, and if so, what; state fully the details of the business which you did with them"; and to the answer to said question, which is as follows: "A. These gentlemen interested several parties in Seattle; I think I can recall them. One was Angus Mackintosh, then in the Merchants' National Bank; Mr. C. G. Austin, Judge Ira Bronson and myself, in this remedy, and a company was organized to manage the business. I was to have a certain interest in the stock—a certain interest in the company, and Mr. Bronson was, I think, to have a fifth interest. I do not believe I ever received the stock. And I was to give my note for five thousand dollars, due I think in six months, which I did. Messrs. Crane and Bellinger had a sale on for the State of California at the time, they claimed, for $20,000. This sale was practically all made excepting they had to go down there to demonstrate the value of the remedy, which

they said if it went through the money would be in and my share of it would be enough to pay the note before it was due. If they made the sale the money was never turned anywhere excepting to themselves, as it never came in to the company. I went into the business with them in good faith believing that they had a specific and a sure cure for all the drug habits and the liquor habit. I entered into it in absolute good faith, as well as did the other gentlemen in the company. I went east to Massachusetts accompanied by Mr. Bronson, and with positions secured offices were opened up to prove the efficacy of the remedy. We first opened in Massachusetts and were there for some time. * * * We only met with partial success there. Dr. Bellinger insisting that it was the physicians' fault that the cures were not made; and we finally asked him to come on himself—which he did—on to Boston; but he was partially successful only. He then suggested that we try in Chicago, and we opened a sanitarium in Chicago; I putting in up to that time over ten thousand dollars in cash. But that was only partially successful, and was left in the care of physicians there. I remained with the company perhaps a year and a half in various attempts to make the thing a success; but after that length of time I was convinced that it could not be made a success and I abandoned it, with the loss of a great deal of money."

IV.

That the Court erred in overruling the objection of the plaintiff in error to the question propounded to the

witness Ira D. Bronson on behalf of the defendant in error as follows: "Were you present at any negotiations between Crane and Bellinger with Mr. Moore?" and to the answer thereto: "A. About the first of March, 1893, I don't remember the exact date, but about the first of March, at the request of Mr. Moore, I went with him to an institute so-called, that was operated by F. P. Bellinger and George J. Crane. * * * I say, about the first of March, I, at the request of Mr. Moore, went to an institute, a so-called institute, that was operated by a Mr. George J. Crane and F. P. Bellinger, to investigate the value and the efficacy of a certain formula and remedy, as we called it, for the cure of the habit of tobacco, alcoholism, morphia and cocaine. At that meeting we met Mr. Bellinger; I think Mr. Crane was there at that first meeting—that is my impression, I think I saw him. I stated to Mr. Bellinger what I had come for, and he at once told me—I cannot give you the language, no, I cannot do that, but I can give you the substance of it. * * * That is many years ago. He said that he had a remedy that his father had discovered while he was a surgeon in the German army; that while his father was there in that position he had quite a number of soldiers who were addicted to alcoholism, and he searched to find a cure, and at last discovered a herb from which he concocted, and with other things, a remedy which acted very nicely and cured the patients that he had, the soldiers. Some time after, how long I don't know, that remedy came into his possession, whether by gift, purchase or otherwise, I

don't know; but he was the owner of it, and that after he became the owner of it he experimented with it and spent years, a good many years, in experimenting and in perfecting it, and to that extent that it would not only cure alcoholism, but also the tobacco habit, and finally the cocaine and the morphia habits. In our conversation I asked him whether he was the owner of it or not. He said he was. Then I asked him about the efficacy of it, what it would do. He reiterated that it would cure those habits. Then I asked him what length of time it would take to cure them, and he said that the tobacco habit could be cured in from ten days to three weeks, and my recollection is he said that some few cases he had cured even in a week. That I am not absolutely positive of, whether it was he or Mr. Crane may have said that, but I think it was Mr. Bellinger. Then I asked him if that was a cure, was a permanent cure. He said, 'Oh, yes.' They never wanted to use tobacco afterwards. Then I asked him how long it would take to cure the alcohol habit. He said from two to three weeks, possibly four, ranging from two to four weeks, and that that was a positive cure also. Then I asked him in regard to the liquor habit—I mean the morphine habit. He said that that would take from four to six weeks. I asked him if he had had any very severe, serious cases. 'Many,' he said. I asked him if he always cured them. He said he did. I asked him what length of time. He said, 'From four to six weeks.' Being a little skeptical I asked him further, 'Are you sure that you can cure the worst habit—the worst patient, those

who had been addicted the longest, in six weeks?' 'Yes,' he said, 'almost all cases, but there may be once in a great while a case that would take eight weeks, but that would cure any, absolutely any case.' That I think was all that we had at that meeting in relation to that. I mean by that, that that is all I remember"; and in permitting the said answer to go before the jury.

V.

That the Court erred in sustaining the objection of the defendant in error to the following question propounded by the plaintiff in error to George J. Crane on behalf of the plaintiff in error: "Q. Mr. Crane, after the note was renewed, the note for five thousand dollars was renewed by Mr. Moore, payable directly to the Citizens' State Bank, state whether or not the bank released you from liability to them"; and in overruling the offer of the plaintiff in error of certain testimony as follows:

"Mr. KIEFER.—What I want to show, if your Honor please—I want to make a definite offer to show that the bank, after acquiring this note, that is, the original Moore note for $5,000, as collateral security for the obligations of the witness on the stand to the Citizens' State Bank, that the Citizens' State Bank, the then holder of this original Moore note, without the knowledge or consent at that time of this witness on the stand, extended the time of payment at the request of the defendant Moore, and then subsequently took the note of the defendant direct to the Citizens' State Bank,

without the consent of the witness on the stand, and that thereupon the witness claimed to be released, and the bank released him in pursuance of that"; and in overruling the offer of the plaintiff in error as follows:

"Mr. KIEFER.—No, we do not. I want to make an offer now, if the Court please. I want to prove by the witness on the stand that when he learned of the bank having accepted the note direct from Moore, that in lieu of the one by him delivered to the bank as collateral security, the original five thousand dollar note, that he objected to the action of the bank and demanded to be released, and that the bank did release him from all except—released him personally and all his property except the Moore note, and agreed to look wholly to the Moore note for the indebtedness for which the Moore note had been given as collateral. That is what I offer to show. And to follow it up by proof of the identity of the date for which the Moore note was given as collateral security—the original Moore note, I mean.

The COURT.—That does not indicate to me when that occurred.

Mr. KIEFER.—As soon as he learned it from Mr. Moore, in 1893, of the acceptance by the bank of his, Moore's, note direct to the bank.

The COURT.—The only inference I can draw from that is that that was after the maturity of the note.

Mr. KIEFER.—It was after the maturity of the note; as soon as this witness learned of the action of the bank from Moore.

Mr. GILMAN.—We object to that, if the Court please.

(Objection sustained by the Court, and an exception allowed to plaintiff.)"

VI.

That the Court erred in denying the motion of the plaintiff in error for a peremptory instruction to the jury directing the jury to render a verdict in favor of the plaintiff for the full amount of plaintiff's claim.

VII.

That the Court erred in refusing the request of the plaintiff for the following instruction:

"Under all the law and evidence in the case the jury are instructed to return a verdict in favor of the plaintiff for the full amount of the notes pleaded in plaintiff's amended complaint, with interest from date at the amount stipulated therein, to wit, eight per cent per annum to be compounded semi-annually."

VIII.

That the Court erred in refusing to give the jury, at the request of the plaintiff in error, the following instructions:

"If the jury find from the evidence that the defendant, in making said contract with George J. Crane and F. B. Bellinger in March, 1893, for the purchase of stock in the Bellinger German Remedy Co., for which said $5,000 note was given, relied upon his own investigation of the merits of the alleged cure for the liquor, drug and tobacco habits, then no defense has been made out in

this case, and the verdict should be for the plaintiff for the full amount of the plaintiff's claim.

The defendant cannot set up the failure of Bellinger's cure for the liquor, drug and tobacco habits to work out as he expected, unless in making the contract for the purchase of stock in the Bellinger German Remedy Co. he relied wholly and entirely upon the representation of Crane and Bellinger that the said cure was a success."

IX.

That the Court erred in refusing to give the jury, at the request of the plaintiff in error, the following instruction:

"If the jury find from the evidence that the contract of F. B. Bellinger and George J. Crane for the transfer of the Bellinger remedy for the liquor, drug and tobacco habits, was made with the Bellinger German Remedy Co., a corporation, then the defendant has not made out his defense, and the verdict must be for the plaintiff for the full amount claimed."

X.

That the Court erred in refusing to give the jury, at the request of the plaintiff in error, the following instructions:

"If the jury find from the evidence that F. B. Bellinger and George J. Crane, in March, 1893, honestly believed that said Bellinger possessed a cure or remedy for liquor, drug and tobacco habits, and their experience with the use of the same led them to believe that the same was a good cure, and they honestly repre-

sented to the defendant that it was a good cure, the failure of such cure to work perfectly after long trial would be no defense to the defendant in this action.

If the jury find from the evidence that Crane and Bellinger honestly believed that they had a good and successful cure for the liquor, drug and tobacco habits in March, 1893, and in good faith, believing in said cure, organized a corporation known as the Bellinger German Remedy Co., and sold to the defendant one-fifth of the stock of said corporation for his said note for $5,000, although it eventually turned out that said cure could not be made a medical and commercial success, the failure of the same to prove a medical and commercial success would not afford any defense to the defendant, and the verdict of the jury should be for the plaintiff for the full amount sued for."

XI.

That the Court erred in giving to the jury the following instruction:

"Now, gentlemen of the jury, there is a question in the case as to which there is a conflict of testimony, and it is referred to the jury to decide what the truth about it is, whether there was knowledge on the part of the cashier, or whoever acted for the Citizens' State Bank of Council Bluffs at the time of receiving that five thousand dollar note. It is shown by uncontradicted evidence that the transaction was through Mr. Hannan, who was an officer of that bank at that time, and whose deposition has been taken in this case. Mr. Hannan will be presumed, as the result of the uncontradicted

testimony in the case, to have been authorized to act for the bank in that matter, and any knowledge or information which he had on the subject is to be imputed to his principal, the bank for which he was acting, and the jury must determine this question of whether he knew of the fact that Mr. Moore had been swindled (if in fact he was swindled) in the transaction by which the note was obtained from him. In determining that question you are to consider all the facts and circumstances attending the transaction and showing what knowledge Mr. Hannan did have in regard to the maker and the payees of the note, and in regard to their dealings, together with respect to that note and the circumstances under which the note was obtained, and determine from a consideration of the testimony whether the evidence shows that Mr. Hannan did know of enough of the transaction to have put a prudent man on inquiry before accepting the note as a purchaser of it in good faith. The bank is chargeable not only with the knowledge which Mr. Hannan actually did have, but if there was some knowledge on his part which should have been a warning to him, and would have caused a prudent business man to have made inquiry, then the bank is chargeable with all the knowledge that might have been obtained by an inquiry, and if there was a swindle practiced, and the bank, through Mr. Hannan, knew it or should have known it, then the note was equally void in the hands of that bank as in the hands of Crane and Bellinger, and if void in the hands of the Citizens' National Bank it is likewise void in the hands of the plaintiff bank."

XII.

That the Court erred in giving to the jury the following instruction:

"I charge you that if the original note given by the defendant in this case to George J. Crane was without consideration and was obtained by said Crane from the defendant by false and fraudulent representations made by said Crane or his associate Bellinger to the defendant, and that the defendant signed said note relying upon such representations and believing them to be true, then said note was invalid in the hands of Crane and Bellinger, or either of them, and they would have no right to recover from the defendant thereon. I charge you that if said Crane and Bellinger, or either of them, represented to the defendant that they or either of them owned a secret formula from which a medicine could be compounded that was a specific for and would cure the morphine, cocaine, liquor and tobacco habits, and if said representations were made for the purpose of inducing the defendant to sign said original note in order to purchase an interest in said formula, and if the defendant, relying upon said representations and believing them to be true, and so relying and believing, signed said original note, and if as a matter of fact said defendants did not own or possess any such formula, said defendants did not own or possess any such formula, or if the formula so claimed to be possessed by them was not a specific or cure for said habits, and the said Crane and Bellinger, or either of them, knew that they possessed no such formula, or

knew that any formula owned or possessed by them was not a specific or cure for said habits, then I charge you that such action on the part of Crane and Bellinger would amount to fraudulent misrepresentation, and said note would be without consideration and void in the hands of Crane and Bellinger. I charge you that if said note was obtained by said Crane and Bellinger, or either of them, from the defendant without consideration, and by false and fraudulent representations, and the Citizens' State Bank had notice or knowledge of said fraud and lack of consideration at the time said note was transferred to it, then the rights of said bank in this note would be no greater than those of Crane and Bellinger, and under such circumstances said bank could not recover thereon.

I charge you that notice or knowledge on the part of a cashier of a bank who acts for it in a transaction is, in law, notice or knowledge to the bank itself.

The plaintiff sues as the assignee of the notes in controversy and it has no other or greater rights than the assignor, the Citizens' State Bank, and if said State Bank could not recover then plaintiff cannot recover."

XIII.

That the Court erred in giving the jury the following instruction:

"I charge you that if you shall find under the instructions that I have heretofore given you that the original note was fraudulent and without consideration in its inception and that at the time of its transfer to the Citizens' State Bank (this fact was known by that bank or

by its cashier who acted for it in the purchase of the same, and that the renewal notes which are the subject of the suit in this action were executed by the defendant without notice of the original fraud, if any, practiced on him, or if said renewals were obtained from the defendant by the false and fraudulent representations made by said bank, or its cashier, to the defendant, to the effect that said note had been acquired for value without notice in due course of business, then I instruct you that your verdict must be for the defendant."

XIV.

That the Court erred in giving to the jury the following instruction:

"In the progress of the trial and in the discussion of the case complaint has been made that there was a new liability created by novation. The Court instructs you that there was not any liability created by novation. A novation is a contract that requires three parties and the minds of all three must meet and be in accord so as to effect a novation. That would occur in a case in which we will say A (supposing that to represent a person) is indebted to B and B is indebted to C and they all agree that A shall become liable to C for the debt of B, and B releases A from any further obligation to him and C accepts A in the place of B and releases B from any oligation to him. That constitutes a novation. You see it requires the concord of three minds."

XV.

That the Court erred in giving to the jury the following instruction:

"I charge you that if you shall find from the evidence that said note was fraudulent and without consideration in its inception, then the burden of proof is upon the plaintiff to establish by preponderance of evidence that the Citizens' State Bank was a bona fide holder of said note and if you shall find from the evidence that the said note was fraudulent and without consideration in its inception, and shall further find that the plaintiff has not established by a preponderance of the evidence that the same was taken in due course of business without notice of such fraud, then your verdict must be for the defendant."

XVI.

That the Court erred in denying the motion of the plaintiff in error for judgment notwithstanding the verdict, and in rendering and entering judgment herein in favor of the defendant in error for costs, and that the plaintiff in error take nothing by its action.

JAMES KIEFER,
JAMES McNENY,
Attorneys for Plaintiff.

[Endorsed]: Assignment of Errors. Filed in the U. S. Circuit Court, Western Dist. of Washington. Mar. 22, 1906. A Reeves Ayres, Clerk. H. M. Walthew, Dep.

In the United States Circuit Court of Appeals, in and for the Ninth Circuit.

FIRST NATIONAL BANK OF COUNCIL BLUFFS, IOWA, Plaintiff in Error, vs. J. A. MOORE, Defendant in Error.	No. 1128.

Supersedeas Bond on Writ of Error.

Know all men by these presents, that we, the First National Bank of Council Bluffs, Iowa, plaintiff in error, as principal, and the National Surety Company of New York, a surety corporation, under the laws of the State of New York, as surety, are held and firmly bound unto J. A. Moore, defendant in error, in the sum of two hundred and fifty dollars ($250) lawful money of the United States to be paid to the said obligee, his heirs, executors, administrators and assigns, for which payment well and truly to be made, we do bind ourselves, and each of us, and each of our successors and assigns firmly by these presents.

Dated March 19, 1906.

Whereas, the above-named principal, the First National Bank of Council Bluffs, Iowa, has prosecuted a writ of error from that certain judgment entered in the United States Circuit Court for the Western District of Washington on March 5, 1906, wherein and whereby it was adjudged and decreed that the complaint and cause of action of the said First National Bank of Councii

Bluffs, Iowa, should be dismissed and the plaintiff take nothing thereby, and that the above-named J. A. Moore, defendant in said cause No. 1128, should recover his costs and disbursements.

Now, the condition of this obligation is such that if the plaintiff in error shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then this obligation to be void; otherwise to be and remain in full force and virtue.

FIRST NATIONAL BANK OF COUNCIL BLUFFS, IOWA.

By JAMES KIEFER,
Its Attorney.

NATIONAL SURETY CO. [Corporate Seal.]

By JOHN W. ROBERTS,
Res. Vice-President.

Attest: H. S. JORDAN,
Res. Asst. Sec.

The foregoing bond approved March 22d, 1906.

C. H. HANFORD,
Judge.

Copy of foregoing bond received March ——, 1906, and original may be approved by the Court without notice.

L. C. GILMAN,
M. M. LYTER,
Attorneys for Defendant.

[Endorsed]: Supersedeas Bond on Writ of Error. Filed in the U. S. Circuit Court, Western Dist. of Washington. Mar. 22, 1906. A. Reeves Ayres, Clerk. H. M. Walthew, Dep.

In the Circuit Court of the United States for the Western District of Washington, Northern Division.

FIRST NATIONAL BANK OF COUNCIL BLUFFS, IOWA,
Plaintiff,
vs.
J. A. MOORE,
Defendant.

No. 1128.

Clerk's Certificate to Transcript.

United States of America,
Western District of Washington,—ss.

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States for the Western District of Washington, do hereby certify the foregoing one hundred and fifty-seven (157) type-written pages, numbered from 1 to 157, inclusive, to be a full, true and correct copy of the papers, records and all proceedings had in the foregoing and therein entitled cause, as the same now remain on file and of record in the office of the clerk of said Circuit Court at Seattle in said district; and that the same constitutes the return to the annexed writ of error.

I further certify that I annex hereto and transmit herewith the original citation issued in said cause.

I further certify that all of the papers, records and proceedings filed and recorded in said cause in the Circuit Court of the United States for the District of Washington prior to the passage of the act of Congress of March 2, 1905, have been duly certified to the Circuit Court of the United States for the Western District of Washington, as required by said act of Congress of March 2, 1905, dividing the State of Washington into two judicial districts.

I further certify that the cost of preparing and certifying said return to writ of error is the sum of $144.70, and that the same has been paid to me by James Kiefer, Esq., Attorney for First National Bank of Council Bluffs, Plaintiff above named, and Plaintiff in Error.

In witness whereof I have hereunto set my hand and affixed the seal of said Circuit Court, this 31st day of March, 1906.

[Seal] A. REEVES AYRES,

Clerk U. S. Circuit Court, Western District of Washington,

By H. M. Walthew,

Deputy Clerk of Said Court.

Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States to the Honorable, the Judges of the Circuit Court of the United States, for the Western District of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said Circuit Court before you, or some of you, between The First National Bank of Council Bluffs, Iowa, plaintiff, and plaintiff in error, and J. A. Moore, defendant, and defendant in error, a manifest error hath happened to the great damage of the said First National Bank of Council Bluffs, Iowa, plaintiff in error, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you may have the same at the city of San Francisco in the State of California, on the 16th day of April next, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and

according to the laws and customs of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, 22d day of March, 1906.

[Seal] A. REEVES AYRES,

Clerk of the United States Circuit Court for the Ninth Circuit, Western District of Washington.

By H. M. Walthew,

Deputy Clerk.

Writ allowed March 22, 1906.

C. H. HANFORD,

Judge.

Received a true copy of the foregoing writ of error for defendant in error.

Dated this —— day of March, 1906.

——————————,

Clerk of the United States Circuit Court for the Ninth Circuit, Western District of Washington.

By ——————————,

Deputy Clerk.

Copy of within writ of error received and service of same acknowledged this 22d day of March, 1906.

L. C. GILMAN,

M. M. LYTER,

Attorneys for Defendant and Defendant in Error.

[Endorsed]: In the United States Circuit Court, for the Western District of Washington. First National Bank of Council Bluffs, Iowa, vs. J. A. Moore. Writ of

Error. Filed in the U. S. Circuit Court, Western Dist. of Washington. Mar. 22, 1906. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States to J. A. Moore, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 16 day of April next, pursuant to a writ of error filed in the office of the clerk of the Circuit Court of the United States for the Western District of Washington, in that certain action numbered 1128, entitled First National Bank of Council Bluffs, Iowa, plaintiff, vs. J. A. Moore, defendant, in which the said First National Bank of Council Bluffs, Iowa, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 22 day of March, 1906.

[Seal] C. H. HANFORD,

District Judge, sitting as United States Circuit Judge, Ninth Circuit, Western District of Washington.

Service of the within and foregoing citation and receipt of a copy thereof, as well as a copy of the writ of error admitted this 22d day of March, 1906.

L. C. GILMAN,

Counsel for J. A. Moore, Defendant in Error.

[Endorsed]: In the United States Circuit Court for the Western District of Washington. First National Bank of Council Bluffs, Iowa, vs. J. A. Moore. Citation. Filed in the U. S. Circuit Court, Western Dist. of Washington. Mar. 22, 1906. A. Reeves Ayres, Clerk. H. M. Walthew, Deputy.

[Endorsed]: No. 1323. United States Circuit Court of Appeals for the Ninth Circuit. First National Bank of Council Bluffs, Iowa, Plaintiff in Error, vs. J. A. Moore, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Western District of Washington, Northern Division.

Filed April 4, 1906.

F. D. MONCKTON,

Clerk.

No. 1323

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

FIRST NATIONAL BANK of Council Bluffs, Iowa, *Plaintiff in Error,*

vs.

J. A. MOORE, *Defendant in Error.*

BRIEF OF PLAINTIFF IN ERROR

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

JAMES KIEFER and
JAMES McNENY,
Attorneys for Plaintiff in Error.

Seattle, Washington.

Lowman & Hanford Stationery and Printing Co., Seattle, Wash.

FILED
MAY 14 1906

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

FIRST NATIONAL BANK of Council Bluffs, Iowa, *Plaintiff in Error,* vs. J. A. MOORE, *Defendant in Error.*	No. 1323

BRIEF OF PLAINTIFF IN ERROR

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

STATEMENT OF THE CASE.

This action was brought to recover upon three promissory notes made by the defendant in error, to the assigner of plaintiff in error, the Citizen's State Bank of Council Bluffs, Iowa, dated January 2, 1897, two of them for $2,500.00 each and one of them for $800.00, and all due six months after date.

The notes are set out in full in plaintiff's amended complaint as well as the assignment and delivery. No question arises in this case as to the execution and the assignment and delivery of these notes by the Citizen's State Bank to the plaintiff in error.

The action was begun September 21st, 1903, and it is alleged in the 7th paragraph in each cause of action in the amended complaint that at the time the notes matured the defendant in error was not a resident or inhabitant of the State of Washington, nor of the State of Iowa, nor to be found therein, and that less than six years prior to September 21st, 1903, he came into and became a citizen and resident of the State of Washington, and had been such for less than six years prior to the commencement of the action.

It is also alleged in the succeeding paragraph that prior to July 2, 1903, and after the maturity of the notes, Moore, in writing, acknowledged the indebtedness and obligation of the notes.

It was conceded by the defendant at the trial in his own testimony that he did not live in the State of Washington and was not in the State between July, 1897, and November and December, 1897, and the Court did not submit that question to the jury, as the defense was abandoned.

At the trial the citizenship of the plaintiff in error and the assignor was admitted as alleged in the amended complaint.

The defense of the defendant in brief is that the notes sued upon were renewals of an original note made March, 1893, in favor of one George J. Crane, for the sum of $5,000.00, and that this original note was obtained from the defendant in error by fraud and false representations, about as follows:

That said Crane and one Dr. F. P. Bellinger represented to defendant in error that they were the owners of a formula or specific for the cure of liquor, tobacco, cocaine, morphine and other habits, and that the same was a success and a thorough cure for these habits, and that in consequence of the representations of Crane and Bellinger it was agreed between them and the defendant in error that a corporation should be formed to take over said cure and exploit the same, and that defendant in error should pay $5,000.00 for one-fifth of the capital stock of such corporation; that the corporation was formed under the laws of the State of Washington, having a capital of one million dollars, and that the sole and only consideration for said note was the purchase of one-fifth of the capital stock of said company; that Dr. F. P. Bellinger did not in fact have any cure, and that the entire scheme was a fraud. The defendant in error further set up that the Citizen's State Bank received the original note from Crane with knowledge of the fraud practiced upon Moore in obtaining the note, and that Moore was induced to renew the same by the representations of the Citizen's State Bank; that it had purchased the note in the usual course of business without any knowledge of fraud or other infirmity in the consideration and that Moore did not know of the fraud practiced upon him until 1902.

The plaintiff in error replied, denying all all of the allegations of the defense except that it admitted the formation of the corporation known as the Bellinger German Remedy Company, and the fact that the notes in suit were renewals of the original $5,000.00 note.

Upon the trial plaintiff in error introduced in evidence the three notes sued upon, made proof that the same were delivered to it in December, 1899, together with all the other commercial paper and assets of the Citizen's State

Bank, and had since been in its possession, and also proved the execution of the written assignment pleaded and introduced that in evidence.

It was agreed that the amount of the attorney's fees should be left to the Court in the event of the verdict for the plaintiff.

Proof was offered of the absence of the defendant in error from the State of Washington between July 1 and December, 1897, and numerous written acknowledgements of the notes by the defendant were also offered in evidence.

As stated above, the defense of the statute of limitations was later abandoned by the defendant upon his own testimony and was eliminated from the case.

The citizenship of plaintiff in error and the assignor was admitted.

Plaintiff in error then rested.

After the making of an opening statement by the defendant's counsel, plaintiff in error objected to the introduction of any evidence in support of the 3rd and 4th alleged affirmative defenses pleaded in the answer, for the reason that no sufficient defense was pleaded in either of these defense.

In these affirmative defenses it appears that the contract between the defendant in error and Crane and Bellinger was for the purchase of the stock in the corporation, and there was no offer to return the stock, no offer of recision and no counterclaim is pleaded.

This objection was by the Court overruled and objection saved.

The defendant gave evidence that Crane and Bellinger procured one Austin to interest defendant in error in the promotion and sale of the alleged cure and that he fully

investigated the cure both personally and through others, and that Crane and Bellinger did represent to him that the cure was a good one, and that they owned it.

By the deposition of Dr. Bellinger taken on behalf of the defendant in error, the formula was disclosed and defendant in error offered expert testimony of druggists and physicians to the effect that the formula as stated by Dr. Bellinger was not intelligible, and could not be compounded, and was, in short, no formula.

The defendant in error also introduced the deposition of Charles R. Hannan, former cashier of the Citizen's Bank, to the effect that at the time of obtaining the original note for $5,000.00 from Crane, "he knew of the transaction Crane had had with Moore," and that "he knew that it was given for the recipe and privilege of using a recipe for an opium and whisky cure," but went no further. Did not state anything of the details of his knowledge.

Hannan testified that what he learned from Crane he learned in the office of the Bank in Council Bluffs in conversation with him.

Plaintiff in error showed by George J. Crane in rebuttal that he had not seen Hannan for some months prior to obtaining the original $5,000.00 note from Moore, and that when he last saw Hannan before this deal he was not acquainted with Moore and did not know of him, and that he did not again see Hannan until after the note matured, and that immediately after obtaining the note he sent it to Council Bluffs by mail, and that he never at any time disclosed to Hannan the nature of the consideration for the note. He also testified that Moore relied upon his personal investigation of the cure. That Crane and Bellinger maintained an institute for the cure of whisky and drug patients in Seattle, and that Moore investigated the cure and that no false representations were made to Moore.

Crane also testified that he delivered the stock to Moore and collected his note. He was corroborated by his daughter, Mrs. Beasley, who testified that her father delivered the stock in her presence and received Mr. Moore's note for $5,000.00, and that she immediately wrote a letter, sending it forward to Council Bluffs to the Citizen's State Bank and that her father did not see Mr. Hannan from the time when he first became acquainted with Mr. Moore until after the maturity of the original note.

It also appeared from the testimony of Mr. Crane that upon the maturity of the original $5,000.00 note, the Citizen's State Bank took a note from Mr. Moore, payable directly to the bank without Crane's knowledge or consent, and that he objected thereto and demanded to be released as soon as he learned of it, and was released from his primary indebtedness to the bank.

At the close of the evidence plaintiff in error moved the Court to instruct the jury peremptorily to return a verdict in favor of the plaintiff in error for the full amount of the notes in suit, principally upon the ground that the evidence of the witness Hannan, which was all the evidence relied upon by the defendant in error, was insufficient to show any knowledge or notice on the part of the Citizen's State Bank of any alleged fraud or misrepresentation of the original note. And also upon the ground that by accepting the renewal note fro mMr. Moore, payable direct to the Bank, there was a novation and sufficient consideration for the new note, and that the new note was purged of any infirmity in the consideration for the old one.

This motion was by the Court denied and exception saved and the case was submitted to the jury upon the two questions as to whether or not there had been any fraud or misrepresentation and swindle practiced upon

Mr. Moore in the original deal, and if so, whether Hannan, who had admittedly acted for the Citizen's State Bank, had sufficient knowledge of the nature of the transaction to impeach the paper in the hands of his bank.

The verdict was rendered for the defendant and the plaintiff in error interposed a motion for judgment notwithstanding the verdict, basing it principally upon the grounds above stated.

The Court denied the motion, and also a subsequent petition for a new trial. Thereupon this writ of error was sued out, assigning the following errors:

ASSIGNMENT OF ERRORS.

I.

That the United States Circuit Court in and for the Western District of Washington erred in overruling the objection of the plaintiff in error to the introduction of any testimony in support of the third alleged affirmative defense pleaded in the answer of the defendant.

II.

That the Court erred in overruling the objection of the plaintiff in error to the introduction of any testimony in support of the fourth alleged affirmative defense pleaded in answer of the defendant.

III.

That the Court erred in overruling the objection of the plaintiff in error to the question propounded to the witness Moore upon the stand, as follows:

"Q. Now, I will ask you if you subsequently entered into any business transactions with Bellinger and Crane

with reference to acquiring the formula for this remedy, and if so what; state fully the details of the business which you did with them;" and to the answer to said question, which is as follows: "A. These gentlemen interested several parties in Seattle; I think I can recall them. One was Angus Mackintosh, then in the Merchant's National Bank; Mr. C. G. Austin, Judge Ira Bronson and myself, in this remedy, and a company was organized to manage the business. I was to have a certain interest in the stock, a certain interest in the company, and Mr. Bronson was, I think, to have a fifth interest. I do not believe I ever received the stock. And I was to give my note for $5,000.00, due, I think, in six months, which I did. Messrs. Crane and Bellinger had a sale on for the State of California at the time, they claimed, for $20,000. This sale was practically all made, excepting they had to go down there to demonstrate the value of the remedy, which they said if it went through the money would be in and my share of it would be enough to pay the note before it was due. If they made the sale the money was never turned anywhere excepting to themselves, as it never came into the company. I went into the business with them in good faith, believing that they had a specific and a sure cure for all the drug habits and the liquor habit. I entered into it in absolute good faith, as did the other gentlemen in the company. I went East to Massachusetts accompanied by Mr. Bronson, and with positions (physicians) secured, offices were opened up to prove the efficacy of the remedy. We first opened in Massachusetts and were there for some time. * * * * * We only met with partial success there. Dr. Bellinger insisted that it was the physicians' fault that the cures were not made; and we finally asked him to come on himself—which he did—on to Boston; but he was partially successful only. He then suggested that we try in Chicago, and we opened a sanitarium in Chicago; I putting in up to that time over Ten Thousand Dollars in cash. But that was only partially successful, and was left in the care of physicians there. I remained with the company perhaps a year and a half in various attempts to

make the thing a success; but after that length of time I was convinced that it could not be made a success, and I abandoned it with the loss of a great deal of money."

IV.

That the Court erred in overruling the objection of the plaintiff in error to the question propounded to the witness Ira D. Bronson on behalf of the defendant in error, as follows: "Were you present at any negotiations between Crane and Bellinger with Mr. Moore?" and to the answer thereto: "A. About the first of March, 1893, at the request of Mr. Moore, I went with him to an institute, so-called, that was operated by F. P. Bellinger and George J. Crane. * * * I say about the first of March, I, at the request of Mr. Moore, went to an institute, a so-called institute that was operated by a Mr. George J. Crane and F. P. Bellinger to investigate the value and efficacy of a certain formula and remedy, as we called it, for the cure of the habit of tobacco, alcoholism, morphia and cocaine. At that meeting we met Mr. Bellinger; I think Mr. Crane was there at that first meeting—that is my impression, I think I saw him. I stated to Mr. Bellinger what I had come for, and he at once told me—I cannot give you the language; no, I cannot do that, but I can give you the substance of it. * * That is many years ago. He said that he had a remedy that his father discovered while he was a surgeon in the German Army; that while his father was there in that position he had quite a number of soldiers who were addicted to alcoholism, and he searched to find a cure, and at last discovered a herb from which he concocted and with other things a remedy which acted very nicely and cured the patients which he had, the soldiers. Some time after, how long I don't know, that remedy came into his possession, whether by gift, purchase or otherwise I don't know, but he was

the owner of it, and that after he became the owner of it he experimented with it and spent years, a good many years, in experimenting and perfecting it, and to that extent that it would not only cure alcoholism, but also the tobacco habit, and finally the morphia habits. In our conversation I asked him whether he was the owner of it or not. He said he was. Then I asked him about the efficacy of it, what it would do. He reiterated that it would cure these habits. Then I asked him what length of time it would take to cure them, and he said the tobacco habit could be cured in from ten days to three weeks, and my recollection is he said that some few cases he had cured even in a week. That I am not absolutely positive of, whether it was he or Mr. Crane said that, but I think it was Mr. Bellinger. Then I asked him if that was a cure, was a permanent cure. He said, 'Oh, yes,' they never wanted to use tobacco afterwards. Then I asked him how long it would take to cure the alcohol habit. He said from two to three weeks, possibly four, ranging from two to four weeks, and that that was a positive cure also. Then I asked him in regard to the liquor habit—I mean the morphine habit. He said that that would take from four to six weeks. I asked him if he had had any very severe, serious cases. 'Many,' he said. I asked him if he always cured them. He said he did. I asked him what length of time. He said, 'From four to six weeks.' Being a little sceptical, I asked him further, 'Are you sure that you can cure the worst habit —the worst patient, those who had been addicted the longest, in six weeks?' 'Yes,' he said, 'almost all cases, but there may be once in a great while a case that would take eight weeks, but that would cure any, absolutely any case.' That, I think, was all that we had at that meeting in relation to that, I mean by that, that that is

all I remember;" and in permitting the said answer to go before the jury.

V.

That the Court erred in sustaining the objection of the defendant in error to the following question propounded by the plaintiff in error to George J. Crane, on behalf of the plaintiff in error: "Q. Mr. Crane, after the note was renewed, the note for $5,000.00 was renewed by Mr. Moore, payable directly to the Citizen's State Bank, state whether or not the bank released you from liability to them;" and in overruling the offer of the plaintiff in error of certain testimony, as follows:

"Mr. Keifer.—What I want to show, if your Honor please—I want to make a definite offer to show that the bank, after acquiring this note, that is the original Moore note, for $5,000.00, as collateral security for the obligations of the witness on the stand to the Citizen's State Bank, the then holder of this original Moore note, without the knowledge or consent at that time of this witness on the stand, extended the time of payment at the request of the defendant Moore, and then subsequently took the note of the defendant direct to the Citizen's State Bank without the consent of the witness on the stand, and that thereupon the witness claimed to be released, and the bank released him in pursuance of that;" and in overruling the offer of the plaintiff in error, as follows:

Mr. Keifer.—No, we do not. I want to make an offer now, if the Court please. I want to prove by the witness on the stand that when he learned of the bank having accepted the note direct from Moore, that in lieu of the one by him delivered to the bank as collateral security, the original $5,000.00 note that he objected to the action of the bank and demanded to be released, and that the bank did release him from all except—released him personally and all his property except the Moore note, and agreed to look wholly to the Moore note for the indebted-

ness for which the Moore note had been given as collateral. That is what I offer to show. And to follow it up by proof of the identity of the date (debt) for which the Moore note was given as collateral security—the original Moore note, I mean.

The Court—That does not indicate to me when that occurred.

Mr. Keifer—As soon as he learned it from Mr. Moore, in 1893, of the acceptance by the bank of his, Moore's, note, direct to the bank.

The Court—The only inference I can draw from that is that that was after the maturity of the note.

Mr. Keifer—It was after the maturity of the note; as soon as this witness learned of the action of the bank from Moore.

Mr. Gilman—We object to that if the Court please. (Objection sustained by the Court, and an exception allowed to the plaintiff.)

VI.

That the Court erred in denying the motion of the plaintiff in error for a peremptory instruction to the jury directing the jury to render a verdict in favor of the plaintiff for the full amount of the plaintiff's claim.

VII.

That the Court erred in refusing the request of the plaintiff for the following instruction:

"Under all the law and evidence in the case, the jury are instructed to return a verdict in favor of the plaintiff for the full amount of the notes pleaded in plaintiff's amended complaint, with interest from date at the amount stipulated therein, to-wit, eight per cent per annum, to be compounded semi-annually."

VIII.

That the Court erred in refusing to give the jury, at the request of the plaintiff in error, the following instructions:

"If the jury find, from the evidence, that the defendant, in making said contract with George J. Crane and F. P. Bellinger, in March, 1893, for the purchase of stock in the Bellinger German Remedy Co., for which said $5,000.00 note was given, relied upon his own investigation of the merits of the alleged cure for the liquor, drug and tobacco habits, then no defense has been made out in this case, and the verdict should be for the plaintiff for the full amount of the plaintiff's claim.

The defendant cannot set up the failure of Bellinger's cure for the liquor, drug and tobacco habits to work out as he expected, unless in making the contract for the purchase of stock in the Bellinger German Remedy Co., he relied wholly and entirely upon the representation of Crane and Bellinger that the said cure was a success."

IX.

That the Court erred in refusing to give the jury, at the request of the plaintiff in error, the following instruction:

"If the jury find, from the evidence, that the contract of F. P. Bellinger and George J. Crane for the transfer of the Bellinger remedy for the liquor, drug and tobacco habits, was made with the Bellinger German Remedy Co., a corporation, then the defendant has not made out his defense, and the verdict must be for the plaintiff for the full amount claimed."

X.

That the Court erred in refusing to give the jury, at the request of the plaintiff in error, the following instructions:

"If the jury find from the evidence that F. P. Bellinger and George J. Crane, in March, 1893, honestly believed that said Bellinger possessed a cure or remedy for liquor, drug and tobacco habits, and their experience with the use of the same led them to believe that the same was a good cure, and they honestly represented to the defendant that it was a good cure, the failure of such cure to work perfectly after a long trial would be no defense to the defendant in this action.

If the jury find from the evidence that Crane and Bellinger honestly believed that they had a good and successful cure for the liquor, drug and tobacco habits, in March, 1893, and in good faith, believing in said cure, organized a corporation known as the German Remedy Company, and sold to the defendant one-fifth of the stock of said corporation, for his said note for $5,000.00, although it eventually turned out that said cure could not be made a medical and commercial success, the failure of the same to prove a medical and commercial success would not afford any defense to the defendant, and the verdict of the jury should be for the plaintiff for the full amount sued for."

XI.

That the Court erred in giving to the jury the following instructions:

"Now, gentlemen of the jury, there is a question in the case as to which there is a conflict of testimony, and it is referred to the jury to decide what the truth about it is, whether there was any knowledge on the part of the cashier, or whoever acted for the Citizen's State Bank of Council Bluffs at the time of receiving that $5,000.00 note. It is shown by uncontradicted evidence that the transaction was through Mr. Hannan, who was an officer of that bank at that time, and whose deposition has been taken in this case. Mr. Hannan will be presumed, as the result of uncontradicted testimony in the case, to have been authorized to act for the bank in that matter, and any knowledge or information which he had on the subject

is to be imputed to his principal, the bank for which he was acting, and the jury must determine this question of whether he knew of the fact that Mr. Moore had been swindled (if in fact he was swindled) in the transaction by which the note was obtained from him. In determining the question you are to consider all the facts and circumstances attending the transaction and showing what knowledge Mr. Hannan did have in regard to the maker and the payees of the note and in regard to their dealings together with respect to that note and the circumstances under which the note was obtained and determine from a consideration of the testimony whether the evidence shows that Mr. Hannan did know of enough of the transaction to have put a prudent man on inquiry before accepting the note as a purchaser of it in good faith. The bank is chargable not only with the knowledge which Mr. Hannan actually did have, but if there was some knowledge on his part which should have been a warning to him, and would have caused a prudent business man to have made inquiry, then the bank is chargeable with all the knowledge that might have been obtained by an inquiry, and if there was a swindle practiced, and the bank, through Mr. Hannan, knew it, or should have known it, then the note was equally void in the hands of the bank as in the hands of Crane and Bellinger, and if void in the hands of the Citizen's National Bank, it is likewise void in the hands of the plaintiff bank."

XII.

That the Court erred in giving to the jury the following instruction:

"I charge you that if the original note given by the defendant in this case to George J. Crane, was without consideration and was obtained by said Crane from the defendant by false and fraudulent representations made by said Crane or his associate, Bellinger, to the defendant, and the defendant signed said note, relying upon such representations and believing them to be true, then

said note was invalid in the hands of Crane and Bellinger, or either of them, and they would have no right to recover from the defendant thereon. I charge you that if said Crane and Bellinger, or either of them, represented to the defendant that they, or either of them, owned a secret formula from which a medicine could be compounded, that was a specific for and would cure the morphine, cocaine, liquor and tobacco habits, and if said representations were made for the purpose of inducing the defendant to sign said original note in order to purchase an interest in said formula, and if the defendant, relying upon said representations, and believing them to be true, and so relying and believing, signed said original note, and if, as a matter of fact, said defendants did not possess any such formula, or if the formula so claimed to be possessed by them was not a specific or cure for said habits, and the said Crane and Bellinger, or either of them, knew that they possessed no such formula, or knew that any formula owned or possessed by them was not a specific or cure for said habits, then I charge you that such action on the part of Crane and Bellinger would amount to fraudulent misrepresentations, and said note would be without consideration and void in the hands of Crane and Bellinger. I charge that if said not was obtained by said Crane and Bellinger, or either of them, from the defendant without consideration, and by false and fraudulent representations, and the Citizen's State Bank had notice or knowledge of said fraud and lack of consideration, at the time said note was transferred to it, then the rights of said bank in this note would be no greater than those of Crane and Bellinger, and under such circumstances said bank could not recover thereon.

I charge you that notice or knowledge on the part of a cashier of a bank who acts for it in a transaction is, in law, notice or knowledge to the bank itself.

The plaintiff sues as the assignee of the notes in controversy, and it has no other or greater rights than the assignor, the Citizen's State Bank, and if said bank could not recover, then plaintiff cannot recover."

XIII.

That the Court erred in giving the jury the following instruction:

"I charge you that if you shall find under the instructions that I have heretofore given you that the original note was fraudulent and without consideration in its inception and that at the time of its transfer to the Citizen's State Bank, this fact was known by that bank, or by its cashier who acted for it in the purchase of the same, and that the renewal notes which are the subject of the suit in this action were executed by the defendant without notice of the original fraud, if any, practiced on him, or if said renewals were obtained from the defendant by false and fraudulent representations made by the said bank, or its cashier, to the defendant, to the effect that said note had been acquired for value without notice in the due course of business, then I instruct you that your verdict must be for the defendant."

XIV.

That the Court erred in giving the jury the following instruction:

"In the progress of the trial and in the discussion of the case, complaint has been made that there was a new liability created by novation. The Court instructs you that there was not any liability created by novation. A novation is a contract that requires three parties and the minds of all three must meet and be in accord so as to effect a novation. That would occur in a case in which we will say A (supposing that to represent a person) is indebted to B and B is indebted to C, and they all agree that A shall become liable to C for the debt of B, and B releases A from any further obligation to him, and C accepts A in the place of B and releases B from any obligation to him. That constitutes a novation. You see it requires the concord of three minds."

XV.

That the Court erred in giving to the jury the following instruction:

"I charge you that if you shall find from the evidence that said note was fraudulent and without consideration in its inception, then the burden of proof is upon the plaintiff to establish by preponderance of evidence that the Citizen's State Bank was a bona fide holder of said note, and if you shall find from the evidence that the said note was fraudulent and without consideration in its inception, and shall further find that the plaintiff has not established by preponderance of the evidence that the same was taken in due course of business without notice of such fraud, then your verdict must be for the defendant."

XVI.

That the Court erred in denying the motion of the plaintiff in error for judgment notwithstanding the verdict, and in rendering and entering judgment herein in favor of the defendant in error for costs, and that the plaintiff in error take nothing by its action.

BRIEF OF THE ARGUMENT.

We will discuss our first and second assignments together. They are found in the record at pages 164-165. The affirmative defenses referred to are found at pages 16 to 22 of the record. They are practically the same, alleging the representations of Crane and Bellinger as to the ownership and character of the formula for the cure and the efficiency of the cure and the formation of the Bellinger German Remedy Co. to exploit the same, and the giving of the original $5,000.00 note for the one-fifth interest in the $1,000,000.00 capital of the corporation.

It is further alleged that Crane and Bellinger agreed to transfer and pretended to transfer the formula to this corporation. It is nowhere alleged that the defendant was in any wise damaged in any amount.

In order to set up a defense the pleader should have gone further and clearly and distinctly set out the amount and character of the defendant's damage, and pleaded it as a counterclaim.

Gruniger vs. Philpot, 5 Bissell 82.
Packwood vs. Clarke, 2 Sawyer 546.

The objection of the plaintiff in error should have been sustained upon another ground. The defenses in question show that the contract was completely executed on both sides, and there is no offer or tender of recision.

Herman vs. Gray, 48 North Western 113.
Bisbee vs. Torrinus, 2 North Western 168.

For our objections to the offer of the testimony under these defenses and our exceptions, see record 49.

II.

Our 6th, 7th, 14th and 16th assignments we will discuss under the same head, as they raise the same or cognate questions. The assignments themselves are found on pages 171-177 and 178 of the record.

We submit that upon all the evidence, as well as upon all of the controlling facts in the cause, plaintiff in error should have had judgment for the full amount of its claim, and we will endeavor to present in appropriate subdivisions the details of our contention:

(a) The defendant in error relied upon the testimony of the witness Hannan, the former cashier of the

Citizen's State Bank, to show knowledge on his part at the time when Crane endorsed to the bank the original $5,000.00 note, of the nature and character of the transaction between Crane and Bellinger and the defendant in error. Let us see just what Mr. Hannan does say. His testimony is shown in full on pages 56 to 65 of the record, but all that he says that may be claimed to have any bearing upon this proposition may be stated in a few words in the language of the witness: "Mr. Crane had fully explained to me just what he was doing—explained what they tried to do in Denver, San Francisco and other places before they went to Seattle, and I was fully advised at all times as to what he was doing. I knew full well what the note was given for, it having been given for the recipe and privilege of using the recipe for an opium and whiskey cure. I state that I knew all about the consideration for the original note." At another place he says: "I had learned from Mr. Crane of the transaction he had with Mr. Moore and he had advised me of the details of the deal, and that he had Mr. Moore's note."

This is the testimony relied upon by the defendant in error to show knowledge on part of the Citizen's State Bank, at the time the bank took over the original note from Crane.

We submit that it is wholly insufficient. It is the settled law in the Courts of the United States that one who acquires mercantile paper before maturity from another who is apparently the owner, giving a consideration for it, obtains a good title, though he may know of facts and cricumstances that would cause him to suspect or would cause one of ordinary prudence to suspect that the person from whom he obtained it had no interest in or authority

to use it for his own benefit, though by ordinary diligence he could have ascertained these facts.

Goodman vs. Simons, 20 Howard 343.
Kaiser et al. vs. First National Bank of Brandon, 78 Federal 281.

A very controlling case is that of *Doe vs. North Western C & T. Co.,* 78 Federal 62.

In that case notes were made by a corporation in favor of its president for alleged services under such circumstances that the Court found that they were fraudulently given and without consideration. A part of these notes were turned over as collateral security for an existing indebtedness and as indemnity against liability as surety for the payee in the corporation notes.

It further appeared that the endorser of these notes knew that the notes were executed by the corporation to its president and used by him in securing his individual debt. This fact was relied upon as a defense to the note, and the Court says that it is a well settled rule of the Federal Courts that the purchaser of a promissory note is not deprived of his rights as a purchaser in good faith by proof of knowledge of such circumstances as to put an ordinarily prudent man upon inquiry to ascertain the facts. The proof must go further and show that at the time of the transfer knowledge of facts that would impeach the title as between the antecedent parties to the note, or knowledge of such facts that his abstention from further inquiry will be tantamount to a wilful closing of the eyes to the knowledge which he knows is available, and therefore presumptive evidence of bad faith upon his part. In this case it even appeared that the endorsee was a director in the corporation issuing the notes.

King vs. Doane, 139 U. S. 166 is very much in point.

Israel vs. Gale, Receiver, 174 U. S. 391, is a well considered case. Where notes were made in favor of a firm simply as accommodation paper on the part of the maker, and one of the partners in the payee firm was president of a bank, and the notes were endorsed by the payee firm and also in the name of the bank. The notes were taken by the president of the bank and negotiated for his individual debt, he claiming to be the owner of them. The makers defended upon the ground that the endorsement of the bank upon the notes, together with knowledge that the person offering the notes for discount, was the president of the endorser bank did not afford any notice sufficient to affect the rights of the bona fide holder.

> *Kaiser vs. First National Bank of Brandon,* 78 Federal 281.

We submit that the testimony of Hannan does not show any knowledge. He states his conclusions and no facts. Upon this point we cite:

> *Bank vs. Stadleman,* 26 Atlantic 201.
> *Clarke vs. Evans,* 66 Federal 263.
> *Atlas National Bank vs. Holm et al,* 71 Federal 489.
> *Collins vs. Gilbert,* 94 U. S. 753.
> *Swift vs. Smith,* 102 U. S. 442.
> *O'Brien vs. Union Pacif. Ry Co.,* 161 U. S. 451.
> *Corbin vs. Ditch Co.,* 17 Col. 146.
> *Vaughn vs. Strong,* 21 N. Y. Suppl. 550.
> *Bank of Chelsea vs. Isham,* 48 Vt. 590.
> *Wolf vs. Arthur,* 16 S. L. 845.

Taking the testimony of Hannan as strongly as possible in favor of the defendant in error, it does not disclose any knowledge on his part of any fraudulent transaction. The sale of the preparation or the recipe for making the preparation for the cure of whiskey and drug

habits is not an unlawful transaction. The fraud and illegal act, according to the contentions of the defendant in error, consisted in the false and fraudulent representations of Crane and Bellinger to Moore. Of this Mr. Hannan does not claim to have had any knowledge. He testifies to nothing beyond knowledge of the nature of the business in which they were engaged. The business was a legal one, and he does not claim to have known anything of any illegal way of doing it. There is no presumption that the transaction, legal in itself, was carried out in an unlawful manner.

> *Davis vs. McReady*, 17 New York 230.
> *Mitchell vs. Catchings*, 23 Fed. 710.
> *Loomis vs. Mowry*, 15 N. Y. S. C. 312.
> *Borden vs. Clarke*, 26 Mich. 412.
> *Miller vs. Finley*, 26 Mich. 249.
> *Patten vs. Gleason*, 106 Mass. 439.
> *Kelly vs. Whitney*, 45 Wis. 110.

In these cases the rule is laid down that there is no presumption of fraud in the manner of doing lawful business, and even extends its protection to patent right notes and notes showing on their face that they were given in payment for warranted machinery. See also:

> *Tiedeman on Commercial Paper*, Sec. 300.

As to the right of one taking commercial paper as collateral security for an existing indebtedness to be considered a purchaser for value we cite:

> *Railroad Company vs. National Bank*, 102 U. S. 25.

(b) The defendant in error pleads affirmatively that the notes in suit are renewals of the original note made in March, 1893, for $5,000.00 in favor of Crane, and that the original note was first renewed direct to the bank,

and then subsequently renewed from time to time directly to the bank. The undisputed fact in the case is that the bank got the original note before maturity.

Plaintiff's exhibit "R" (record 108) shows the history of the first renewal. The effect of this renewal, as we understand it, was to purge the original note of the alleged fraud in its inception. The bank changed its position with regard to the paper from that of endorsee to payee, and released Crane, both as endorser of the Moore note, and upon his primary liability for his indebtedness to the bank. (Record, 126 line 9 et seq.)

According to Moore's letter the arrangement was that Crane be released. The new note was certainly upon sufficient consideration, the old one being surrendered (record 109). Moore testifies (record 118) that he was unable to pay the note, and certainly the surrender of the old one and the extension of time constitute a good consideration and make it a new contract.

Wyman vs. Faben, 111 Mass. 77—

Is very much in point. In that case the note was lost, and just before the same would be barred by the Statute, a renewal was given to prevent the running of the Statute. The maker was afterwards discharged in insolvency proceedings under a Statute passed between the making of the two notes. In an action upon the renewal note it was held that it was a complete contract within itself upon a new consideration, and that the maker was discharged by the insolvency proceedings.

Several notes executed by principals and sureties were sold to a bank by the payee. At maturity the notes were taken up by a bill of exchange made between some of the parties to the note with the consent of the bank, and

in an action on the bill it was held that the consideration for the original notes could not be inquired into.

Estep vs. Burke, 19 Ind. 87.

A maker indebted to a bank in the amount of a note, at the request of the bank gave several new notes. Between the time of giving the original and the new notes he had acquired a homestead, which he claimed to have set apart to him in bankruptcy proceedings. Under the laws of Missouri a homestead could not be acquired as against existing debts. The Court held that the new note was a new contract, and that the old was completely discharged and set aside to the maker of the notes his homestead.

In Re Dixon, 13 Fed. 109.

Upon this point we also cite:

Doherty vs. Bell, 55 Ind. 205.
Rindekoff vs. Doman, 28 Ohio St. 516.
Lyons vs. Plullife, 106 Pa. St. 57.
Smith vs. Smith, 35 Pacific 697.
Keyes vs. Mann, 63 Iowa 560.
Kidder vs. Horrobin, 72 N. Y. 159.
Call vs. Palmer, 116 U. S. 103.
Railroad Company vs. Bailey, 18 Ohio St. 208.
Burke vs. Tisdale, 84 N. Y. 655.
Powell vs. Smith, 66 N. C. 401.
Clough vs. Holden, 20 South Western 695.
Atlanta Natl. Bank vs. Haley, 19 Southern 522.
Stone vs. McConnell, 1 Duv. (Ky. 54).
Gottzmer vs. Pierce, 13 Philadelphia 88.
King vs. Doane, 139 U. S. 166.
Buchannan vs. Bank, 55 Federal 223.
Randolph on Commercial Paper, Sec. 1583-1812.
Daniel on Bills and Notes, Sec. 205.

Counsel for defendant in error contended upon the trial below that the act of Hannan, Cashier of the Citizen's State Bank, in representing to Moore that the bank was the owner of the paper for value without notice and in the ordinary course of business, was a fraud upon Moore. There is nothing in the testimony of Hannan, (Record 59), of Moore (Record 93), which shows anything beyond the bare assertion of the bank's right as bona fide holder. It is not contended that Moore was a customer of the bank and that the parties dealt otherwise than adversely and at arm's length.

Moore had put his paper in circulation, and when he found it in the hands of the bank and the bank asserted its rights as a bona fide holder, was it not the duty of Moore to fully inform himself before acting upon this claim? Moore says in his testimony that he did not know at that time that he had been swindled, as he now alleges, and did not discover it until nine years later. How, then, could Hannan's assertion of the Bank's rights affect him?

Counsel for defendant cited no authority at the trial, and a laborious search on our part has not revealed any case in point.

(c) We contend that our motions for a peremptory instruction and for judgment, notwithstanding the verdict, were well taken upon the ground that the defendant's own testimony shows that there was a novation. The letter of the defendant (plaintiff's exhibit "R" record 108) shows that the defendant procured the release of Crane from his alleged liability as endorser of the original $5,000.00 note of the defendant, and the testimony of Crane (Record 126, line 9 et seq.) shows that he was released by the bank not only from liability as indorser, but from his liability upon his primary indebtedness to the bank for which this Moore note had been taken as

collateral. It would hardly be disputed that if Crane and Moore had met Mr. Hannan acting for the bank, and a transaction such as here appears had taken place with the consent of all three, that it would have constituted a novation. Certainly no one would gainsay that. What difference can it make that Crane was not present, if he ratified it as soon as he heard of it? The transaction inured to his benefit, and instead of disaffirming it, he ratified it and insisted upon his rights. We do not understand the law of novation to be that all three of the parties must be present at the time, but that a novation can be accomplished by two of them if their act be afterward ratified by the third party. The ratification relates back to the transaction.

> 21 *American & English Ency.* 669.
> *Wellington vs. Scott,* 2 Rob. (La.) 59.
> *Moore vs. Wilcoxen,* 30 South Western 612.
> *N. A. Development Co. vs. Short,* 13 Southern 385.

The payee of a note directed the maker to execute a new one to her son, and upon this being done, surrendered the old one to the maker. Held to be a novation.

> *Fehusenfeld vs. Crockett,* 41 Atlantic 66.

Gates being indebted to Casey, gave Casey an order upon one Miller for $315.00. Casey agreed to release Gates if Miller accepted the order. Miller paid $45.00 on account and accepted the order, and Gates was released by Casey. In an action afterwards brought by *Gates vs. Miller* this was held to be a complete novation, and Miller released.

> *Gates vs. Miller,* 32 Pacific 195.

A plaintiff recovered judgment against his debtor, issued execution and when about to levy upon the judg-

ment debtor's property he accepted a note and a mortgage from the judgment debtor's vendee payable in 10 days. The note and mortgage not being paid he undertook to enforce his judgment against the judgment debtor. It was held that there was a complete novation, and that the original judgment debtor was released, and that as to him the judgment was paid and satisfied.

Union Stove Works vs. Caswell ,16 L. R. A. 85.
See *McLaren vs. Hutchinson,* 22 Cal. 188.

(d) The plaintiff in error was entitled to a peremptory instruction and to the granting of its motion, notwitstanding the verdict upon a fourth ground. The complaint of the defendant in error is that Crane and Bellinger defrauded him by failing to turn over to the corporation the formula for the cure. It will be remembered that the defendant in error proved by his own testimony that the Bellinger German Remedy Co. was formed (Record 100-101) and plaintiff's exhibit "P" (Record 70) that the contract on the part of Crane and Bellinger to turn over the formula was reduced to writing, and was between them and the Bellinger German Remedy Co., a corporation.

Moore swears (Record 91) that he did not know until after the commencement of this suit, or about the time that it was commenced, that the formula was not placed in the safe deposit box, and in his pleading (Record 22) that he did not discover that Crane and Bellinger had no formula until 1902. In his testimony (Record 110) and plaintiff's exhibit "S" (Record 111) it is shown that defendant in error continued in the business until March, 1895, and (Record 123) he says that he took a year and a half or more to discover that he could not succeed with it.

We have, therefore, this proposition: The defendant

in error sought to avail himself of a breach of the contract between the corporation and Crane and Bellinger. He certainly cannot avail himself of any breach of the contract between the corporation and Crane and Bellinger. The remedy for that breach must be pursued by the corporation, and not by the individual stockholder.

In the next place the defendant in error pleads that the stock constituted the consideration for the original note, while his evidence shows that the failure of Crane and Bellinger to deposit the formula in the safe deposit box had nothing whatever to do with the failure of the company or the depreciation of the value of the stock. His evidence shows that Dr. Bellinger furnished all the medicine called for, and that he experimented fully with the cure, and that the failure to have the formula locked up in the safe deposit box in Seattle did not in any way contribute to the failure of the concern. According to Moore's own testimony he did not know until 1902 that they had no formula, some six or seven years after the company had suspended operations. How was he in any wise damaged by the failure of Bellinger to deposit the formula?

III.

Our fourth assignment of error raises the question of the admissibility of the evidence of the witness Bronson. The assignment itself is found on page 166 of the record. See also Record 67. The contract made by Crane and Bellinger was made in writing with the *Bellinger German Remedy Co.* Clearly the negotiations of Moore and Bronson acting for the intended and proposed corporation and Crane and Bellinger, acting for themselves, became and were merged in the articles of incorporation, and the written contract entered into between the corporation on the one side and Crane and Bellinger on the other, and it

was error for the Court to permit the defendant in error to bring before the jury all these prior negotiations and conversations.

Our objections were well taken upon another ground: The contract was not between Moore and Bellinger, but between the corporation and Crane and Bellinger, and the remedy for a breach of it or fraud in making it, it was for the corporation, and Moore can not avail himself of either the breach of the contract or fraud in its making.

IV.

Our fifth assignment of error is found at page 169-170 of the record. Our offers and exceptions appear in the bill of exceptions at pages 148 and 152 of the record.

In substance our offer was to show that when George J. Crane learned that the Citizen's State Bank had accepted Moore's note payable to themselves, he insisted upon his right to be released, and affirmed the action of the bank. The act of the bank clearly had released him, and he was simply insisting upon his rights flowing to him from the act of the bank. Our object in introducing this evidence was to show that Mr. Crane in assenting to this arrangement was completing and establishing a novation of the debt. After excluding this evidence, which would clearly have established a novation, if not already established, as we contend it was, the Court peremptorily instructed the jury (Record 156) that the question of novation was not before them. To this we duly saved our exception (Record 159).

> *Encyc. Law*, Second Edition, Vol. 21, page 669, Art. Novation.

It was also admissible as showing a sufficient consideration for the renewal of the note or notes. The letter

of the defendant in error (plaintiff's exhibit "R" record 108) shows that it was the arrangement between the bank and Moore that Crane should be released, and surely we were entitled to show that Crane availed himself of and consented to the arrangement, thus completing the consideration for the new notes.

V.

In our fifth and eighth requests (Record 146-47) we asked the Court to instruct the jury substantially that if the defendant in making his contract with Crane and Bellinger in March, 1893, for the purchase of the stock in the Bellinger Germany Remedy Co., for which the original note was given, relied upon his own investigation of the merits of the cure, the defense was not made out. This request the Court refused, and this forms the basis of our eighth assignment of error. (Record 171.)

We contend that this assignment is well taken. The defendant in error had requested the Court to instruct the jury that if the note was made relying on Crane & Bellinger's false representations, the note was void unless plaintiff in error was the holder for value before maturity without notice, and the Court did so instruct. Now we had a right to have our theory of the case put to the jury. It can scarcely be contended that the instructions requested incorrectly state the law applicable to the case. No matter what representations Crane and Bellinger may have made, whether true or false, if the defendant in error made an investigation of the merits of the proposition and relied upon it, their representations would afford him no defense. There was abundant evidence to justify this instruction, for the defendant had proved by the evidence of the witness Bronson and his own evidence that he had investigated fully and thoroughly even to the extent of consulting physicians (Record 67-74-88-99-100).

VI.

The Court was asked in our seventh and ninth requests (Record 147) to instruct the jury in substance that if Crane and Bellinger from their experience with this cure believed it to be a good one and made their representations to Moore in good faith, such representations would not afford a defense, even though the cure might not work out to a medical and commercial success. The Court refused to give this instruction, and our tenth assignment of error is predicated upon this refusal. It is quite plain from the history of this entire transaction that what Moore was after and what induced him to go into this trade was the cure itself and not the mere formula. According to his own testimony he had abundant opportunity to try the cure, and he was at least partially successful (Record 90-100-118-123), and according to the evidence of the witness Crane (Record 124-125-127) and Bellinger (Record 53 and 131) their experience with it led them to believe, and they did honestly believe, in the efficacy of the cure. Moore was not injured by the fact that a certain paper formula was not left in the safe deposit vault in Seattle. According to his story the company had suspended operations years before this interesting discovery was made, and according to his story, and according to contract, the formula was not to be made known to the company.

The contract was that Bellinger was to furnish the medicines, and all parties seem to be agreed that he did furnish them so long as the Company kept up its operations. Moore's theory of the case was that he was defrauded by false and fraudulent representations of Crane and Bellinger as to the character of the cure. We certainly were entitled to have the alternative proposition put before the jury by the Court, viz.: That if Crane and Bel-

linger made to Moore representations in which they honestly believed, basing their belief upon their own experience with the cure, such representations would not constitute the fraud relied upon by Moore, even though they did not deposit a paper formula in safe deposit.

VII.

By our eleventh assignment of error (Record 173) we question the correctness of the Court's instruction as to the knowledge of Mr. Hannan, who acted for the Citizen's State Bank in taking the original $5,000.00 note from Crane as collateral security, that a swindle was practiced upon Moore. We submit that this instruction was wrong and prejudicial to the plaintiff in error, and that there is nothing in the record of the case to justify any such instruction as was given. After telling the jury that it was an undisputed fact that Mr. Hannan acted in the premises for the Citizen's State Bank, and that any knowledge or information which he had on the subject is to be imputed to the bank, the Court proceeds: "In determining that question you are to consider all the facts and circumstances attending the transaction, and showing what knowledge Mr. Hannan did have in regard to the maker and the payees of the note, and with regard to their dealings together with respect to that note and the circumstances under which the note was obtained, and determine from a consideration of the testimony whether the evidence shows whether Mr. Hannan did know enough of the transaction to have put a prudent man on inquiry before accepting the note as a purchaser of it in good faith. The bank is chargeable not only with the knowledge which Mr. Hannan actually did have, but if there was some knowledge on his part which should have been a warning to him and would have caused a prudent busi-

ness man to have made inquiry, then the bank is chargeable with all the knowledge which might have been obtained by an inquiry, and if there was a swindle practiced and the bank, through Mr. Hannan, knew of or should have known of it, then the note was clearly void in the hands of that bank as in the hands of Crane and Bellinger, and if void in the Citizen's National (State) Bank, then likewise void in the hands of the plaintiff bank."

(a) This instruction, in the first place, is not justified by the evidence. The defendant in error had offered Charles R. Hannan as a witness, and he must be presumed to have testified to his full knowledge and stated all that he knew. We have quoted his testimony on this subject in full above, and a careful examination of it (Record 56 to 65) will show that he says nothing beyond the bare fact that he knew Crane and Bellinger to be engaged in the sale of a cure for the whiskey and opium habits, and that this note was given in a trade of that kind. Now what other facts or circumstances were there for the jury to take into consideration? The defendant in error in the Court below relied upon the testimony of Hannan to take the case to the jury, and we contend that there is nothing in the record of Hannan's testimony or in that of anybody to justify the Court in telling the jury that they are to consider all the facts and circumstances attending the transaction between Crane and Bellinger and Moore.

Hannan was not in Seattle. It is not claimed that he took any part in the trade, and it is not disputed that the note was sent to him by mail. The defendant's own testimony shows that he learned that the bank had it while Crane and Bellinger were still on the Pacific Coast, and it was wholly wrong and highly prejudicial for the Court to tell the jury in effect that they could guess that Hannan knew about what took place in Seattle.

(b) The Court further told the jury that the bank is chargeable not only with the knowledge which Hannan acquired, but if there was anything in the knowledge which he did have which should have caused him to inquire, the bank is chargeable with what he should have found out. Now, suppose he should have inquired, what would he have learned? Moore swears that he was a year and a half or two years in finding out that the cure was not a success. He also says that he did not know until 1902 that the formula, the loss of which he now so bitterly bewails, was lost. This was some seven years after he got out of the business. His letter (plaintiff's exhibit "R", dated November 28th, 1893, record 108) shows that the note was renewed prior to that time, and it also shows that at that time Moore was very enthusiastic over his buy. So that inquiry from him would certainly have elicited nothing to impeach the paper. Crane and Bellinger swear now that they acted in good faith, and they no doubt would have said the same had inquiry been made of them. Hannan himself says nothing which shows a knowledge on his part which would or should have caused him to hesitate about taking the paper any more than in every day life thousands of men go to their bankers with paper to be discounted, and either volunteer the statement, or in response to an inquiry from the bank, they may say: "I got this in a real estate deal with so and so," or "I got this note of Brown for the sale of some hides," or "hogs," or "cattle," or "lumber," as the case may be. Suppose that A gets B's note for a sum of money and takes it to his banker and asks to have it discounted, or offers it as collateral security, as in this case, and says to his banker, "I sold B a piece of real estate and got that note in payment," and subsequently it should turn out that the title which A conveyed to B was defective, or that he had no

title at all, and swindled B, could the bank be required to hunt up the abstract of title or search the public records and find out the nature and character of A's title to the real estate which he sold to B? That is just the proposition here. It was no more unlawful for Crane to sell to Moore the cure for whiskey and opium habits than to sell him dry goods or groceries or a drove of cattle, and no presumption arises that he did it in an unlawful way.

There was nothing in Hannan's knowledge as testified to by himself to justify any such instruction.

(c) The Court incorrectly quotes the testimony in this instruction, thereby misleading the jury: "The payees of the note" and "the note was clearly void in the hands of that bank as in the hands of the Citizen's State Bank." It is a plain and undisputed fact that Crane was the only payee of the original note, and that Bellinger's name was never used in the note at all.

Finally this instruction was given in contradiction of all rules of the Federal Courts respecting commercial paper:

Goodman vs. Simmons, 20 Howard 343.
Kaiser et al. vs. First National Bank of Brandon, 78 Federal 281.
Doe vs. North Western C. & T. Co., 78 Federal 62.
King vs. Doane, 139 U. S. 166.
Patten vs. Gleason, 136 U. S. 439.
Collins vs. Gilbert, 94 U. S. 753.
Swift vs. Smith, 102 U. S. 442.
Clarke vs. Evans, 66 Federal 263.
Atlas National Bank vs. Holm, 71 Federal 489.
Mitchell vs. Catchings, 23 Fed. 710.
Railroad Co. vs. National Bank, 102 U. S. 25.
Burke vs. Stadleman, 26 Atlantic 201.

VIII.

Our 12th assignment of error (Record 175) is based upon the charge given to the jury as to the representations made by Crane and Bellinger.

We contend that this instruction as given was and is erroneous and prejudicial. It should be borne in mind that the defendant in error pleaded affirmatively that the consideration for the original note of which those sued upon are renewals was the purchase of $200,000.00 of stock in the Bellinger German Remedy Co., and that this company was formed for the purpose of exploiting the cure. It affirmatively appears by the contract entered into by the Bellinger German Remedy Co. (Record 70) and Bellinger and Crane that this formula which is spoken of in the instruction now under consideration was not to be made known to the company, and that all that the company was to get out of it was the use of the medicines. Moore and his witnesses agree that Bellinger furnished medicines as long as the company remained in business and had any occasion for them. There is no complaint that Bellinger and Crane did not furnish the medicines. The company started off in business and continued for about two years, all the time using the medicines of Crane and Bellinger furnished by them. It does not appear that the existence of the formula was questioned until about the time this litigation began for the enforcement of the notes in suit, and that the company had then been out of business, and all others in the business had abandoned it for some six or seven years. How then, can it be said that Moore personally and individually was damaged by the failure of the company to get possession of the written formula? The utmost that can be said of all the evidence upon the subject of the written formula is that Bellinger failed to disclose it in his testimony in such shape that

it could be put up by any person skilled in the compounding of medicines.

It also appeared affirmatively by the defendant's own testimony that Bellinger had put up and furnished medicines which were partially successful for the intended purpose.

We further insist upon our contention made before that the utmost that the defendant has shown is the possible breach of contract and misrepresentation of and in the making of the contract between the corporation and Crane and Bellinger, and that the remedy for the same is not available for this defendant, but the corporation must avail itself of its remedy.

IX.

Our 13th assignment of error is found at record 176. We submit that this instruction is wrong, especially that portion of it wherein the Court tells the jury as follows: "And that the renewal notes which are the subject of this action were executed by the defendant without notice of the original fraud, if any, practiced upon him." This instruction might readily be considered by the jury to mean that no matter how innocently the bank acquired the original note, if the defendant Moore renewed without knowing that any fraud had been practiced upon him, nevertheless such renewal would be open to the defenses here urged. This we submit was entirely wrong, because if the bank acquired the original note without notice he could not defend against that. If he could not defend against the original note, how could he defend against the renewal?

Furthermore, the concluding part of the instruction is erroneous and prejudicial. The testimony of Hannan relied upon by defendant to show knowledge upon his part of the alleged swindle practiced upon the defendant, shows affirmatively that he did not have any such knowledge as would deprive the bank of its standing as a holder for value before maturity. And that therefore no assertion of such

right as a bona fide holder made by him on behalf of the bank could operate as a false and fraudulent representation. There is no testimony to justify this instruction.

X.

In our fifteenth assignment (Record 178) we complain of the rule laid down by the Court as to the burden of proof. The Court told the jury: "I charge you that if you shall find from the evidence that said note was fraudulent and without consideration in its inception, then the burden of proof is upon the plaintiff to establish by preponderance of evidence that the Citizen's State Bank was a bona fide holder of said note, and if you shall find from the evidence that the said note was fraudulent and without consideration in its inception, and shall further find that the plaintiff has not established by a preponderance of evidence that the same was taken in due course of business without notice of such fraud, then your verdict must be for the defendant."

We submit that there was no occasion for this instruction, and that it was highly improper and prejudicial. It appeared from defendant's evidence that the plaintiff's predecessor in interest acquired the original note before maturity and in such manner as to give it full rights as a bona fide holder for value in due course of business unless the officer acting for the said Citizen's State Bank had knowledge of the alleged fraud and swindle, and the defendant in error, in undertaking to prove that the officer did have such knowledge, affirmatively established that he did not, hence there was no occasion for this instruction, and nothing in the record to justify or warrant the giving of it.

The plaintiff in error had met the issue by showing its standing as a bona fide holder for value before maturity, and the burden had shifted back to the defendant in error.

Davis vs. Bartlett, 80 Am. Dec. 375.

Bedell vs. Henning, 11 Am. St. Rep. 323.
Drover's Natl. Bank vs .Blue, 64 Am. St. R. 327.

We submit in conclusion that there was absolutely nothing to take this case to the jury; that the testimony of the witness Hannan, relied upon by the defendant in error to take the case to the jury, shows absolutely nothing to justify the submission of it to the jury, and that the judgment should be reversed and the case sent down with instructions to enter judgment for the plaintiff in error.

If we are mistaken in this, then we contend that an examination of the charge of the Court below will show that inadvertently, and without intending so to do, the Court became unduly impressed with the defense, and in submitting the case to the jury, unconsciously dwelt upon and magnified the defense, and gave the propositions of the defense an unwarranted and undue prominence before the jury, and ignored and minimized the theory of the plaintiff in error.

Taken as a whole it seems to us that the charge must make this impression upon this Appellate Court, and that it must be apparent to this Court that the trial Court unintentionally passed over and made light of the theory of the plaintiff in error, and that the jury must have imbibed from the Court the idea that the defendant in error had been made a victim of unscrupulous swindlers, and that the Citizen's State Bank participated in the swindle.

We submit, therefore, that the judgment should be reversed and that if the plaintiff in error is not entitled to judgment, it is entitled to a new trial.

Respectfully submitted,

JAMES KIEFER,
JAMES McNENY,
Attorneys for Plaintiff in Error.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH JUDICIAL CIRCUIT

FIRST NATIONAL BANK OF COUNCIL BLUFFS, IOWA,
Plaintiff in Error,
vs.
J. A. MOORE, *Defendant in Error.*

No. 1323

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

Brief of Defendant in Error

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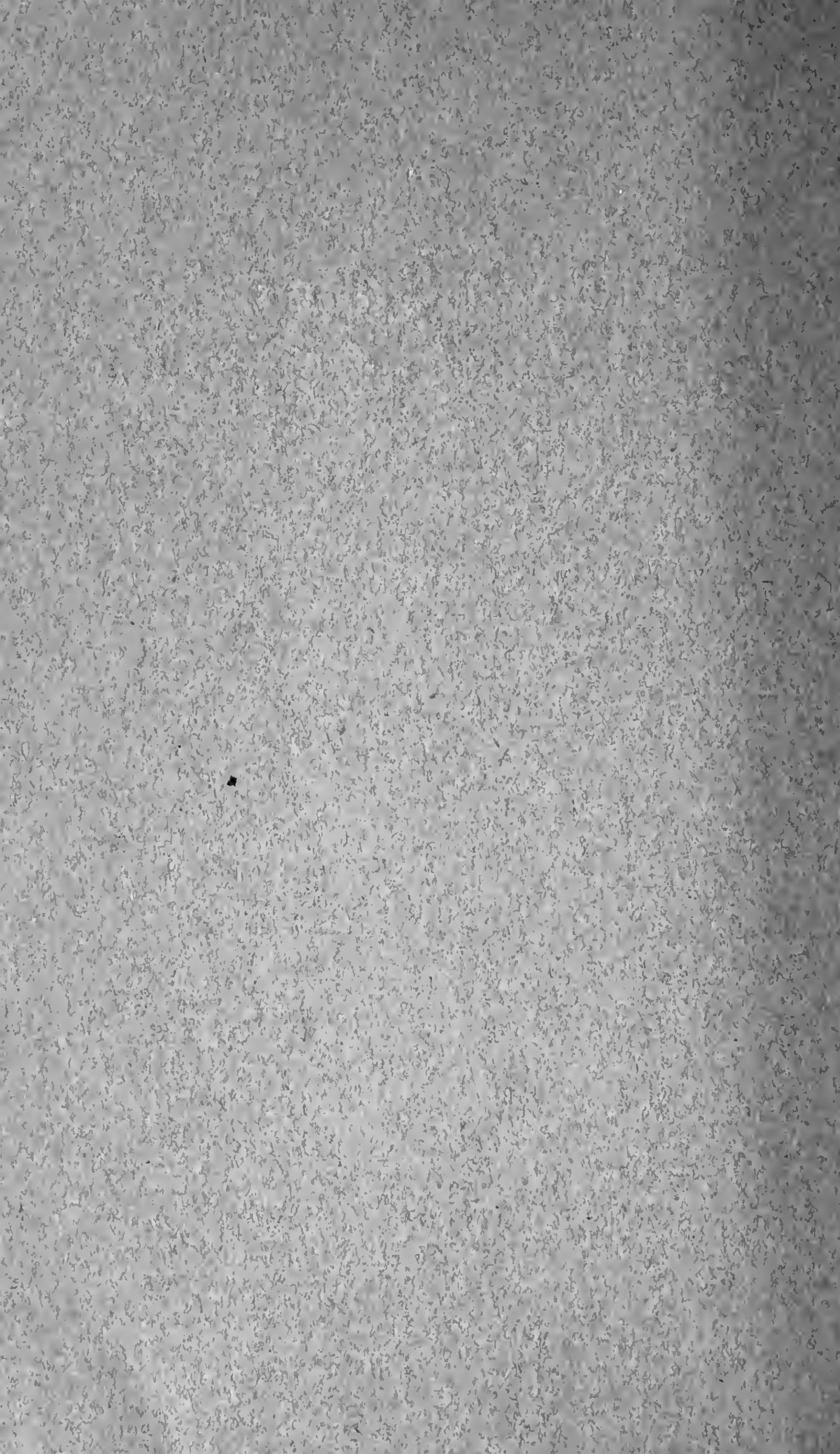
SEATTLE, WASH.

The Ivy Press, Printers and Engravers, Seattle

FILED
JUN -6 1906



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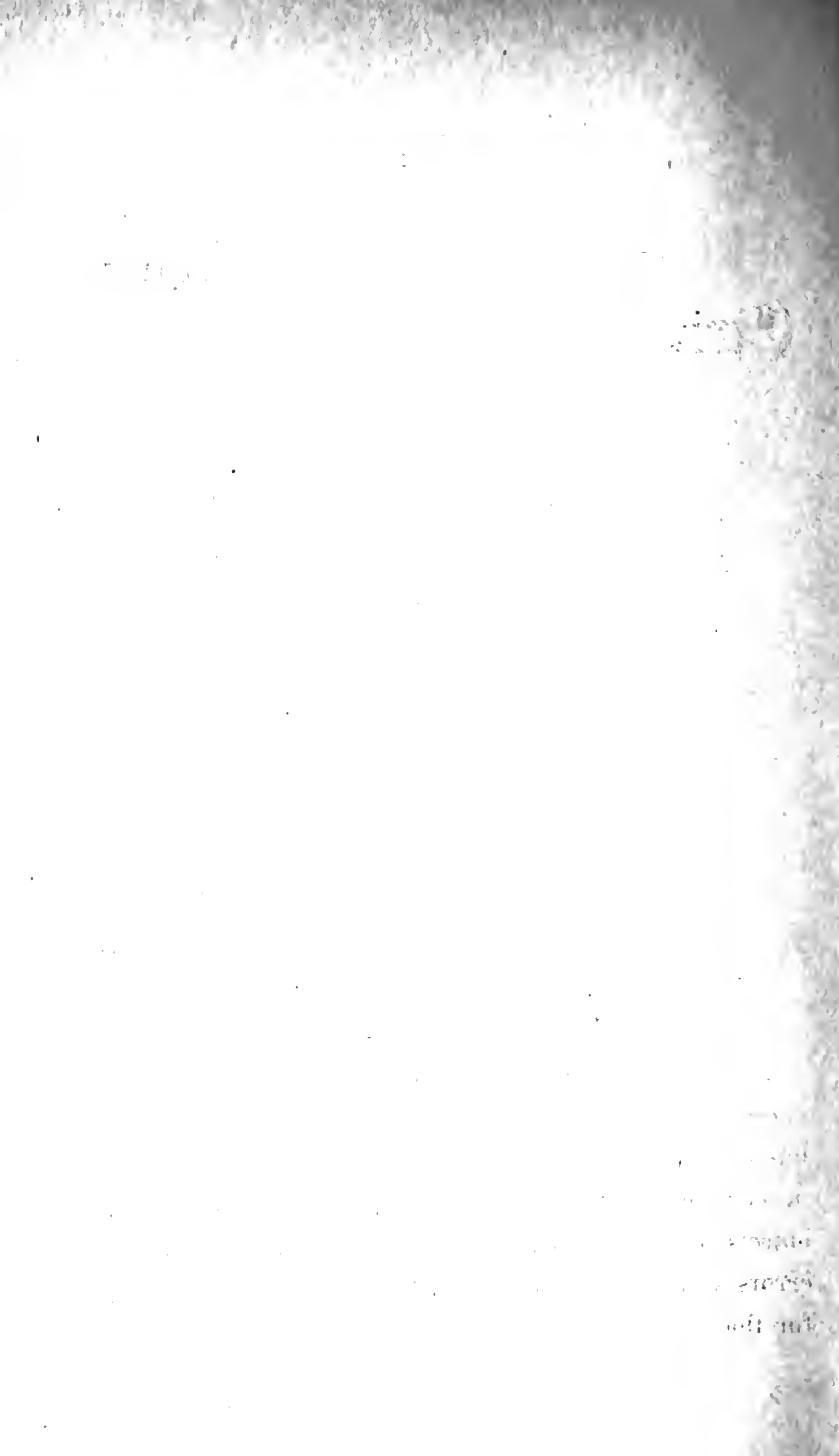

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Brief of Defendant in Error

MOTION TO STRIKE BILL OF EXCEPTIONS AND OBJECTION TO CONSIDERATION OF ERRORS ASSIGNED.

Comes now the defendant in error, J. A. Moore, and hereby moves the court to strike from the record herein the so-called bill of exceptions in this cause, appearing in the printed record from pages 34 to 161, inclusive, and objects to the consideration by the court of the alleged errors assigned herein thereon by the plaintiff in error, for that:

I.

The so-called bill of exceptions in the record herein does not constitute a proper, sufficient or legal bill of exceptions, and the record herein contains no proper, sufficient or legal bill of exceptions.

II.

No proper, sufficient or legal assignment of errors was filed in the Circuit Court of the United States for the Western District of Washington, Northern Division, and no proper, legal or sufficient assignment of errors appears in the record herein.

III.

The exceptions appearing in said so-called bill of exceptions to the instructions given and refused by the court appear to have been taken *in solido,* and not specifically to separate and distinct propositions of law involved in said instructions.

This motion and this objection are based upon the record herein on file in this court.

L. C. Gilman and
M. M. Lyter,
Attorneys for Defendant in Error.

ARGUMENT ON MOTION AND OBJECTION.

The so-called bill of exceptions (Record, pp. 34-161, inclusive) is so utterly defective and insufficient in form that no error can be predicated upon any of the so-called exceptions therein set forth. It opens with the statement that the case came on for trial; then follows a statement that certain witnesses were called and sworn, with a transcript of portions of the testimony reduced to narrative form; the objections by counsel to the admission of evidence, the rulings of the court thereon and exceptions taken by counsel thereto, all intermingled with colloquies between counsel and between respective counsel and the court; a transcript *in full* of the charge of the court, followed by exceptions taken by counsel for the plaintiff in error to different portions of the court's charge, and to the refusal of the court to give certain requested instructions, these exceptions being entirely disconnected from the portions of the charge excepted to. This document is not a bill of exceptions. It is nothing more nor less than a reduction into narrative form of the stenographer's notes—a history of what occurred at the trial—; it is without the orderly and systematic arrangement necessary in a proper and sufficient bill of exceptions. None of the exceptions taken to instructions or refusals to instruct are pointed by any evidence showing the applicability of such instructions. Should the court under-

take to consider any particular assignment of error made upon an instruction or refusal to instruct, and to determine whether any instruction given was improperly given, or instruction refused was improperly refused, it will find nothing in the assignment itself or in the exception upon which it is based as a guide from which the court can say whether the particular instruction given or refused was in any way germane to the evidence before the jury. In order to reach a determination as to the correctness of the action of the lower court upon any question raised by an instruction or refusal to instruct, this court would be compelled for itself to search through the entire record for that particular evidence to which the instruction under consideration is applicable. In short, the court would be compelled to construct for itself a bill of exceptions from the incoherent mass of matter that is dumped into the record and termed a "Bill of Exceptions." Counsel cannot in the preparation of a brief, or the court in the consideration of the case and preparation of an opinion, have before it as one complete whole any particular individual assignment of error. Should this court attempt to give consideration to any assignment of error based upon an instruction given, it would be compelled:

1st. To examine the exception in one part of the record;

2d. To then search the charge of the court set forth at full in another part of the record to ascertain whether or not this particular instruction was given; and

3d. To then examine the entire evidence to see whether or not there was any evidence rendering such instruction applicable.

The courts, wherever the practice of preserving error by means of bills of exception prevails, have condemned and refused to consider documents of this character as constituting proper bills of exception, and this court has condemned and refused to consider a bill of exception identical in form with the one now under consideration.

Frank Waterhouse, Ltd., v. Rock Island Alaska Mining Co., 38 C. C. A. 281; 97 Federal, 466-471.

In this case Judge Morrow, speaking for the court, says:

"The appellee has interposed a motion to strike from the record the document purporting to be a bill of exceptions, appearing therein, on the ground that it does not constitute a proper, sufficient, or legal bill of exceptions. The appellee also objects to the consideration by the court of the alleged errors assigned by the appellant, on the ground that no proper, sufficient, or legal assignment of errors was filed in the circuit court, and no proper, legal, or sufficient assignment of errors appears in the record. The bill of exceptions covers 156 pages of the printed record. It contains the usual formal introductory matter, and then follows a transcript of the testimony of witnesses in narrative form, with the objections by counsel to the admission of testimony, and the rulings of the court with respect to such objections; a report in full of the charge of the court to the jury; the exceptions taken by

counsel to certain portions of the charge, and to the refusal of the court to give certain instructions requested; and the exhibits in the case, including, also, the proceedings on a motion for a new trial. The certificate of the trial judge to this bill of exceptions recites that in 'order that all the motions, offers, rulings, exceptions, and other proceedings had, and all the testimony, exhibits, and other evidence adduced, received, or offered, in said cause, and not already a part of the record, may be by this bill of exceptions made a part of the record therein,' the judge has set his hand and seal to the same, and certifies that the bill of exceptions, together with the sundry exhibits therein mentioned, 'contains all the motions, offers, rulings, exceptions, and other proceedings had, and all the material testimony, exhibits, and other evidence adduced, received, or offered, in said cause, from the beginning of said cause down to the date of this certificate, and contains all the material facts, matters, and proceedings in said cause not already a part of the record therein, including the charge of said judge to said jury in full.' The record thus made up appears to be a report of the trial of the case in such fullness of detail as to incumber the record with much useless matter, and impose upon this court the difficult task of determining the precise relation of scattered testimony to the principles of law declared by the court in the instructions given to the jury, and to the propositions of law contended for by counsel, and rejected by the circuit court in the instructions refused. This method of presenting a case to the appellate court has been repeatedly condemned by the supreme court of the United States."

The Supreme Court in the case of *Hanna v. Maas,* 122 U. S. 24, discussing a bill of exceptions of this character, says:

"The bill of exceptions, instead of stating distinctly, as required by law and by the Fourth Rule of this court, those matters of law in the charge which are excepted to, and those only, does not contain any part of the charge,

or any exception to it, and undertakes to supply the want by referring to exhibits annexed, containing all the evidence introduced at the trial, the whole charge to the jury, and notes of a desultory conversation which followed between the judge and the counsel on both sides, leaving it to this court to pick out from those notes, if possible, a sufficient statement of some ruling in matter of law.

"But to assume to do that would be to take upon ourselves the duty of drawing up a proper bill of exceptions, a duty which belonged to the excepting party, and should have been performed before suing out the writ of error. This we are not authorized to do. Our duty and authority are limited to determining the validity of exceptions duly framed and presented.

"The defendants having failed to reduce their exceptions to such a form that this court can pass upon them, the judgment must be affirmed."

See also

City v. Baer, 13 C. C. A. 572; 66 Federal 440-445;

Phosphate Co. v. Cummer, 9 C. C. A. 279; 60 Federal 873;

Improvement Co. v. Frari, 7 C. C. A. 149; 58 Federal 171;

Scaife v. Land Co., 30 C. C. A. 661; 87 Federal 308-310;

The Francis Wright, 105 U. S. 381;

Lincoln v. Claflin, 7 Wallace 132;

Railroad Co. v. Fitzgerald (D. C. App.) 22 Washington Law Reports 217;

Railroad Co. v. Walker, Id., 223.

In *City v. Baer*, *supra*, the Circuit Court of Appeals of the Fifth Circuit says:

"It" (the bill of exceptions) "purports to embrace all of the testimony submitted by the parties. It all appears to be set out in the order of its introduction, without any special local relation to any of the exceptions on which the eighty-seven assignments of error claim to repose. We will not tax our time and the patience of the reader by repeating the reasoning we have heretofore delivered on this subject. * * * The document referred to cannot be taken as a bill of exceptions."

In *Railroad Co. v. Fitzgerald, supra,* the Supreme Court of the District of Columbia says:

"The court will not regard itself under any obligation to search through a mass of testimony inserted in a bill of exceptions, with a large amount of irrelevant matter and formal statements, to ascertain what there is that bears upon some specified ruling of the trial judge."

The various exceptions relied upon by plaintiff in error are all embraced in one document termed a bill of exceptions, and while this may be proper, we submit that each exception really constitutes a bill by itself, and must stand alone and be considered upon the matter and that only contained in itself. Proper matter outside of the exception itself might be made a part of it by reference, but the court is not bound to look beyond what is incorporated in the exception, either directly or by proper reference, to determine whether or not it is well taken; and it has been established by repeated rulings of the Federal Courts that every bill of exceptions must be considered as presenting a distinct and substantial case, and it is on the evidence stated in itself alone that

the court is to decide; and when exception is taken to instructions of the court given or refused, such exceptions must be accompanied by a distinct statement of the testimony given or offered which raises the question to which the exception applies.

> *Insurance Co. v. Raddin,* 120 U. S. 183-195;
> *Jones v. Buckell,* 104 U. S. 554-556;
> *Worthington v. Mason,* 101 U. S. 149;
> *Dunlop v. Munroe,* 7 Cranch 242;
> *Scaife v. Land Co., supra.*

Applying the principle of these cases to the alleged bill of exceptions before the court, it is apparent that no one of the exceptions based upon the instructions given or instructions refused can be considered by the court, as there is no evidence incorporated in the exception itself, either directly or by proper reference from which the court can determine whether the instruction complained of was proper to be given or refused, and the court can only determine the propriety of the instruction by itself examining the entire mass of testimony included in the bill of exceptions in the order of its introduction and covering, including exhibits, upwards of one hundred pages of the printed record, and segregating therefrom the evidence, if any, applicable to any particular instruction. And the same is true as to exceptions to the admission or exclusion of evidence. There is no attempt

in the bill of exceptions to segregate and place by itself in an orderly manner the evidence to which any such exception is applicable. The objections to evidence and exceptions taken to the admission or exclusion thereof are flung into the record in the same order that they occurred, and in the words that fell from the lips of counsel at the time of the trial. We submit that the only proper method of presenting exceptions to this court is by properly segregating the matter pertinent to any exception from all other matter in the record, so that this exception standing alone would, if it were the only question presented, constitute a complete bill of exceptions, and that this court should not encourage the practice of putting into the record for a bill of exceptions the stenographer's notes of the trial. Since the case of *Frank Waterhouse, Ltd., v. Rock Island Alaska Mining Co., supra,* was decided by this court, counsel practicing therein has had notice of what would be required by this court in a bill of exceptions, in order to properly present a case for review, and there is no excuse for counsel or parties disregarding the plain mandate of the court.

II.

The assignments of error based upon instructions given and instructions refused, being assignments 7 to 15, inclusive, are as defective as the bill of exceptions in the particulars above enumerated. (Record, pp. 171-178.)

These assignments are based upon instructions given and instructions refused; each contains a verbatim copy of the instruction given or the instruction refused, and nothing more. None of them quote any portion of the testimony or make any reference thereto. The sufficiency of such assignments has been twice before the Circuit Court of Appeals for the Fourth Circuit, and in each case that court has refused to consider errors so assigned.

Newman v. Steel & Iron Co., 25 C. C. A. 382; 80 Federal 228-234;

Surety Co. v. Schwerin, 26 C. C. A. 45; 80 Federal 638;

In the first case above cited the court says:

"So far as the assignments relate to instructions asked for and refused, they neither quote nor refer to the evidence that shows the relevancy of the propositions of law propounded by such instructions, and therefore we presume that no such testimony was before the jury, in which event it is evident that the court below did not err in refusing to give them."

In the latter case the court says:

"We are unable to consider the point suggested by counsel for the plaintiff in error concerning the refusal of the court below to give the instructions asked for by the defendant, for the reason that the evidence, if any there was, showing the relevancy of the propositions of law propounded thereby, is neither quoted in full nor its substance referred to in the assignments of error."

A reference to the assignments of error made in the case at bar upon instructions given and instructions re-

fused (Assignments 7 to 15, inclusive; Record, pp. 171-178) discloses that in no one of the assignments, based as all of said assignments are, upon instructions given and refused, is contained any allusion to the evidence, and the court will therefore presume that, as to instructions given, the court had the evidence before it, making such instructions proper, and as to instructions refused that there was no evidence upon which the court could base the instructions asked for.

In this connection attention is called to the fact that the rules of the Circuit Court of Appeals for the Fourth Circuit relative to bills of exceptions and assignments of error are identical with those of this court. (See Compiled Rules Circuit Court of Appeals, 78 Federal, pages XXXI, et seq.; Rules Fourth Circuit, 78 Federal p. LVI; Rules Ninth Circuit, 78 Federal, p. CII.)

III.

Under elementary principles of law, this court cannot consider Assignments of Error 7, 8, 9, 10, 12, 13, 14 and 15. These assignments are based upon instructions given at the request of the defendant, and the refusal to give instructions requested by the plaintiff. No proper exception was taken to the giving of the instructions asked by the defendant, or the failure to give those asked by the plaintiff, but the plaintiff took one general

exception to the action of the court in giving one set of instructions and refusing the other. We refer to the record to show the manner in which these portions of the charge were excepted to (Bill of Exceptions, Record pp. 158-159), wherein appears the following:

"The plaintiff * * * excepted to the refusal of the court to give to the jury the instruction requested by plaintiff in writing before the beginning of the argument to the jury, numbered 1, 5, 6, 7, 8, 9, and 10, and to the giving of the first, second, third, fourth, fifth, sixth and seventh instructions as requested by the defendant."

It will be seen that the plaintiff, instead of pointing out specifically to the court, by an exception, each particular instruction in which it was claimed that the court had committed error, lumped in one exception his objections to fourteen different instructions, involving as many propositions of law. Such an exception will not, nor will assignments of error based thereon, be considered by the court.

Ry. Co. v. Prunty, —— C. C. A. ——; 133 Federal 13;

Hindman v. Bank, 50 C. C. A. 623; 112 Federal 931;

Anthony v. Ry. Co., 132 U. S. 172.

Allis v. U. S., 155 U. S. 118;

Thiede v. Utah, 159 U. S. 520.

In *Ry. Co. v. Prunty, supra,* the court, in discussing an assignment of error based upon an exception to an

instruction which contained two propositions of law, says:

"This excerpt from the charge is excepted to and assigned as a whole as error, without specifying the part of it to which objection is made. The last paragraph of the charge is simply to the effect that a contention of the railway company, which there is no evidence to support, need not be considered by the jury. This is so clearly correct that we need not further comment on it. This, in fact, disposes of the whole assignment, for an objection to an entire charge, consisting of several propositions, some of which are right, should not be sustained, even if the charge contained errors not specifically pointed out."

In *Hindman v. Bank, supra,* there were forty-one errors assigned upon the charge of the court. These errors were based upon eight exceptions taken to the charge. In discussing this case, the court says:

"Objection is made that these exceptions are too general; that each is an exception covering several distinct propositions; and that, if any proposition be good, the whole exception must fail. * * * An exception to a charge should be taken before the jury retire. It should be sufficiently definite to call the judge's attention to the particular matter objected to, in order that he may have an opportunity to correct it. *Neither should an exception cover two distinct propositions, for such an exception is insufficient if either one should prove correct.*"

In *Allis v. U. S., supra,* the Supreme Court says:

"A party must make every reasonable effort to secure from the trial court correct rulings or such at least as are satisfactory to him before he will be permitted to ask any review by the appellate tribunal; and to that end he must be distinct and specific in his objections and exceptions."

Thiede v. Utah, supra, is directly in point. At the close of the case the defendant presented a body of instructions in twenty-two paragraphs, and asked the court to give them, which the court refused to do. The defendant then made one general exception to the refusal of the court to give instructions requested by the defendant numbered 1, 2, 3, 4, 5, etc., exactly as the plaintiff did in this case. The court says:

> "Such an exception is insufficient to compel an examination of each separate instruction. It is enough that any one of the series is erroneous. In *Beaver v. Taylor,* 93 U. S. 46, 54 (23: 797, 798), this precise question was presented, and the court said: 'The entire series of propositions was presented as one request; and, if any one proposition was unsound, an exception to a refusal to charge the series cannot be maintained.' "

We do not think that counsel for the plaintiff in error will contend that all of the instructions asked for by him, and refused, correctly stated the law, and that all the instructions asked for by the defendant, and given, were erroneous. Unless such be the case, the exception discussed in this paragraph was unavailing, and this court will not review the action of the lower court in giving or refusing to give any of the instructions mentioned.

We submit that for the reasons given our motion to strike the bill of exceptions and objection to the consideration of error assigned, should be sustained; that there is no proper record before the court enabling it to re-

view this cause; and that the judgment of the lower court should be affirmed.

Without waiving the foregoing motion and objection, but still insisting thereon, the defendant in error submits the following brief on the merits:

STATEMENT OF THE CASE.

In the latter part of the year 1892 or early in the year 1893, there came from Council Bluffs, Iowa, to Seattle, Washington, two men, George J. Crane and "Dr." F. P. Bellinger. They established at Seattle a sanitarium for the cure of those addicted to the morphine, cocaine, chloral, liquor and tobacco habits. They claimed that Bellinger possessed a secret formula, from which a medicine could be compounded, which was a specific for the habits above named.

Desiring to make money by the exploitation and sale of this so-called remedy, they for some reason selected the defendant in error for one of their victims, and through the agency of one C. G. Austin, to whom they offered to make it an object to induce Moore to invest with them (Record p. 50), they succeeded in obtaining Moore's attention and interest. They represented to him that Bellinger owned this secret formula, that it had been discovered by his father, who was a surgeon in the Ger-

man army, that it contained a certain drug which could not be procured in the United States, and for which they had to send to Germany, that there was not a chemist in the United States who could analyze or determine what this drug was, and that the formula was a sure cure for the habits mentioned. (Record pp. 51, 52.) By these representations and representations of a similar character, they finally succeeded in inducing the defendant in error to purchase a fifth interest in this formula for the sum of Five Thousand Dollars ($5,000) and to give his promissory note in that amount therefor. The sale of this fifth interest was accomplished in this way: A corporation, known as the "Bellinger German Remedy Company," was organized, and Bellinger transferred this pretended formula to the company, in consideration of all its capital stock, and Bellinger and Crane then transferred one-fifth of the capital stock to Moore, receiving therefor his note of Five Thousand Dollars ($5,000), made payable to the order of Crane, but owned in fact one-half by Crane and one-half by Bellinger. Bellinger then made a contract with the corporation whereby he agreed to compound from this formula and furnish such medicines as were required at the different sanitariums which the corporation proposed to establish. While this formula was transferred to the corporation, its contents were to be kept a secret until after Bellinger's death, but in order that it might be available after that event, Bel-

linger agreed to deposit the formula in a safe deposit box in the City of Seattle.

After these arrangements had been completed the defendant in error undertook to exploit this remedy and to sell territorial rights to the same. The business proved a complete failure. The pretended remedy was a hoax, and the company, after a short period had elapsed, became hopelessly insolvent and discontinued doing business. At about the time the company ceased doing business Austin and others, desiring to ascertain what the supposed formula contained, broke into the safe deposit box, supposed to contain the same, and found nothing there but a *piece of blank paper*. (Record p. 52.)

After the commencement of this action, the defendant in error sued out a commission and took the testimony of "Dr." Bellinger at Council Bluffs, Iowa. The question was propounded to him as to what this formula contained. He at first refused to answer, but, being ordered by the commissioner to answer, repeated the names of ten or twelve well-known drugs, without stating the proportions in which the same were to be compounded. (Record pp. 55, 56.) Well-known and skillful physicians and pharmacists, who testified on the trial, stated that this pretended formula was not a formula at all, and no compound that could be made of the different drugs mention-

ed would act as a specific for the morphine habit, or any of the habits mentioned. (Record, pp. 75 to 86.)

It is apparent that this pretended remedy was a fraud, that the representa tion made to Moore to induce him to execute the Five Thousand Dollar ($5,000) note were false and fraudulent and that the note was without consideration. We do not understand the plaintiff in error in this case to contend otherwise. In any event, a jury has so found, and their finding is sustained by ample testimony. The promissory note given by Moore, as above stated, payable to the order of George J. Crane, was by Crane endorsed to a bank in Council Bluffs, Iowa, known as the Citizens' State Bank, and placed with said bank as collateral security for an antecedent indebtedness of Crane. The bank at the time, through its cashier, had knowledge of the fraud that had been perpetrated upon Moore in obtaining this note (Record pp. 56, 57, 58), but from time to time represented to Moore that it had acquired the same before maturity, without notice, in good faith and for value. Mr. Moore, relying upon these representations and believing the same, supposed that he had no legal defense to the note, notwithstanding it was fraudulent in its inception, and, therefore, renewed it from time to time, at the request of the bank, and upon the representations mentioned. The notes sued upon are notes given in renewal of this original note, and were

assigned after maturity by said Citizens' State Bank to the plaintiff in error.

ARGUMENT.

The first and second assignments of error, which are discussed in Paragraph One of the brief of plaintiff in error, attack the sufficiency of the affirmative defenses in defendant's answer. An examination of the answer and of the authorities cited will disclose that the learned counsel for the plaintiff in error has confounded the defense of a partial want or partial failure of consideration, with the defense of fraudulent misrepresentations inducing the execution of a note, and a total want of consideration. Both *Gruinger v. Philpot* and *Packwood v. Clark* are cases of partial failure of consideration, and hold properly that failure of consideration, in order to constitute a defense, must be a total failure, and that a partial failure can only come in by way of recoupment of damages for the partial failure; but it is entirely different in the case of a defense based upon fraud and a total failure of consideration, and it is elementary that either total failure of consideration or fraud is a sufficient defense to an action on a promissory note between the original parties thereto, or an endorsee having notice of the fraud.

Mr. Daniel, at Section 193, Daniel on Negotiable Instruments, Third Edition, says:

" 'Fraud cuts down everything,' is the sharp phrase of the Lord Chief Baron Pollock in an English case. And between immediate parties it at once destroys the validity of a bill or note into the consideration of which it enters. We have seen that if a horse or other personal chattel is warranted, and a bill, note or check given for the price, the breach of the warranty is no defense to the action on the bill, note or check (unless authorized by statute); but if it appear that the seller knew that there was unsoundness in the horse or other chattel, the element of fraud enters into the transaction. There was, in fact, no contract, and proof of the fraud at once defeats the action on the bill, note or check."

And in 4th American and English Encyclopaedia of Law, Second Edition, at page 193, the rule is thus stated:

"If the consideration of a bill or note is vitiated by fraud the instrument will not sustain an action brought to enforce it by the payee or other immediate party."

With reference to failure of consideration Mr. Daniel, at Section 203, of the Third Edition of his work on Negotiable Instruments, thus states the law:

"The total failure of consideration is as good a defense to a suit upon a bill or note as the original want of it, and is confined to the like parties. If the contract is rescinded, the consideration of the bill or note totally fails, and payment of it cannot be enforced. Thus, if the vendee give his bill or note for goods of a certain manufacture, growth or description, and the payee fails to deliver goods of the character contracted for, the former may rescind the contract and refuse to pay his bill or note, there being a total failure of consideration. So, where a purchaser of a patent gave his note for it, and the patent proved void, it was held that the consideration had totally failed. But proof that another patent had been issued for the same invention to another person would not show that the first was void.

"And a partial failure of the consideration is a good defense *pro tanto*. But such part as is alleged to have failed must be distinct and definite, for only a total failure, or the failure of a specific and ascertained part, can be availed of by way of defense; and if it be an unliquidated claim the defendant must resort to his cross action."

And in Volume 8 of Cyclopedia of Law and Procedure, at page 31, the rule is thus stated:

"As between original parties to a bill or note the consideration thereof may always, in the absence of an estoppel, be inquired into; and a want or failure of the same constitutes a good defense, even though the consideration be expressed therein or expressly acknowledged by the words 'value received.' "

We submit that the true rule is that fraud always constitutes a defense, as does also a total want of consideration. In case of a partial failure of consideration a defendant may be required to bring his cross action.

The third and fourth defenses set forth in the answer herein, allege not only that the execution of the note in question was induced by fraud, but that there was a total want of consideration, and are, therefore, sufficient. It is also claimed that these defenses are insufficient, because they do not allege a rescision and a restoration of, or offer to restore the consideration received. Both cases cited to this point by plaintiff in error, *Herman v. Gray* and *Bisbee v. Torriun,* are cases of partial failure of consideration. The true rule in reference to this ques-

tion is this, that where the consideration has utterly failed, and where the thing received was worthless and without value, neither rescision nor restoration is necessary.

Bishop v. Thompson, 196 Illinois 210; 63 Northeastern, 684; 26 Arkansas, 373;

Larkin v. Mullen, 128 California 449; 60 Pacific 1091;

Cheney v. Powell, 88 Georgia 628; 15 Southeastern 750;

Hengham v. Harris, 108 Indiana 246; 8 Northeastern 255;

Heso v. Young, 59 Indiana 379;

Childs v. Merrill, 63 Vermont 463; 22 Atlantic 626;

Pidcock v. Swift, 51 New Jersey Equity 405; 27 Atlantic 470.

In Page on Contracts, Section 137, the rule is stated in this way:

"The general rule that the party guilty of fraud must be placed *in statu quo* is subject to certain qualifications. If the property received by the person defrauded is worthless or if its value is trifling he need not offer to return it in order to rescind."

The allegations of the answer which is attacked by the plaintiff in error in the assignments under discussion are:

"The said stock of the said corporation is and was wholly worthless and of no value whatsoever." (Record p. 21.)

We submit that the allegations of these affirmative defenses are sufficient and Assignments of Error One and Two are, therefore, without merit.

II.

In the second paragraph of the brief of plaintiff in error there is discussed the sixth, seventh, fourteenth and sixteenth assignments of error. The sixth, seventh and sixteenth raise practically the same question, namely: The sufficiency of the evidence to justify the court permitting the case to go to the jury, but the question raised in the fourteenth assignment of error has no relation to this question, and we will, therefore, make it the subject of a separate discussion.

In limine we assert that the question whether or not there was sufficient evidence to justify the verdict, or whether the court should have directed a verdict for the plaintiff, is not before this court. In order to bring before an appellate court the question whether or not the lower court should have submitted a cause to a jury, the record must contain the entire evidence and there must be a certificate of the lower court to that effect.

Ry. Co. v. Cox, 145 United States 539-606;
Honey v. Ry. Co., 27 C. C. A. 262; 82 Federal 773;
Taylor-Craig Corporation v. Hage, 16 C. C. A. 339; 69 Federal 581;

Oswego Town v. Insurance Co., 17 C. C. A. 77; 70 Federal 225.

All the evidence adduced on the trial in the court below has not been incorporated in the record in this court, and the lower court has not certified that the record does contain all the evidence. The certificate oi the court to the bill of exceptions is that the same "contains all the testimony *in substance* taken and admitted upon the trial of said cause." (Record p. 161.) This is not a certificate that the record contains *all of the evidence.*

Ry. Co. v. Washington, 1 C. C. A. 286; 49 Federal 347-353;

Yates v. George, 51 Indiana 324;

Stratton v .Kinnard, 74 Indiana 302;

Hays v. Bincenns, 82 Indiana 178.

In *Ry. Co. v. Washington, supra,* the court says:

"Whether it" (the evidence) "was sufficient to warrant a verdict on this issue for the plaintiff this court cannot say, because the '*substance*' only of the testimony is embraced in the bill of exceptions, and we would not be willing to disturb the verdict of the jury, or hold that there was not sufficient evidence to support any given issue in a cause, upon the statement contained in the bill of exceptions in this case,—that the witnesses testified in '*substance*' to what is therein stated. The opinion of the jury and of this court might differ widely from that of the parties or the court below as to what was the '*substance*' of the witnesses' testimony. The parties and the court may and should omit from the bill of exceptions all irrelevant and redundant matter; and the testimony of witnesses may be stated in a narrative form when it

was delivered in answer to questions; but what is sent up as the evidence in the case must be certified to be all the evidence, and not the '*substance*' of it, before this court can be asked to pass on the question of its sufficiency to support the verdict."

In *Yates v. George, supra,* the court says:

"In order to present a question to this court arising upon the evidence, the evidence should be set out; and it will not do to say that a witness testified in *substance* the same as another witness. The testimony of two or more witnesses might be regarded by the judge signing the bill of exceptions as substantially alike, while if the evidence were set out in the bill of exceptions, this court might think the testimony of the different witnesses substantially unlike."

And as the bill of exceptions does not purport to give all the evidence, according to well established rules, this court in such a condition of the record is bound to presume that there was testimony which justified the court in sending the case to the jury, and in refusing to give a peremptory instruction.

Russell v. Ely, 67 United States 575.

It is not correct, as claimed by the plaintiff in error, that the defendant in error relied solely upon the testimony of the witness Hannan to establish knowledge on the part of the Citizens' State Bank of the fraudulent character of the paper which Crane gave to it. It relies upon the entire evidence in the cause, which was submitted to the jury, and which is not before this court.

But we submit that we might safely rely upon the

evidence of Hannan alone. This note had been obtained by Crane and Bellinger from Moore by fraud and deceit of the grossest character. It was presented by Crane to Hannan, the cashier of the Citizens' State Bank, for transfer. Mr. Hannan himself, whose testimony was taken at the instance of the defendant, testified (Record pp. 56, 57, 58):

"I did take from George J. Crane a note signed by Mr. Moore. It was while I was cashier of the Citizens' State Bank. *I had learned from Mr. Crane of the transaction he had with Mr. Moore and he had advised me of the details of the deal* and that he had Mr. Moore's note. Mr. Crane at that time was owing us quite a sum of money, the collateral to which I did not consider of much value, and being anxious to obtain as much collateral as possible *for the note, prevailed on him to turn the note over to us, which he eventually did.*

* * * * * * * *

"There was no consideration given for the note; I simply obtained it as additional collateral and filed it along with the collateral we then had, which consisted of of lot of old insurance notes. Mr. Crane simply endorsed the note in blank and turned it over.

* * * * * * * *

"Mr. Crane had fully explained to me just what he was doing—explained what they tried to do in Denver, San Francisco and other places before they went to Seattle, and I was fully advised at all times as to what he was doing. I knew full well what the note was given for, it having been given for the recipe and privilege of using the recipe for an opium and whisky cure.

* * * * * * * *

"I state that *I knew all about the consideration for the original note.*"

This witness, who, for the purposes of this transaction, was the bank itself, states that Crane told him all about the details of his transaction with Moore. The plaintiff had every opportunity for cross-examination, and could have asked him just exactly what was said by Crane at the time, and failed to do so, thereby failing to challenge in any way this statement of the witness as to his full knowledge of the fraud. In this state of the record can it be said that this alone was not sufficient evidence upon which a jury might find that Mr. Hannan, and consequently his bank, had, not only notice, but full knowledge, of the fraudulent character of the note that was the subject of the transaction?

The learned counsel for the plaintiff in error devote pages of argument and cite numerous authorities to establish that the doctrine of the Federal Courts is that mere suspicion or knowledge of facts sufficient to put a prudent man upon inquiry does not invalidate a promissory note in the hands of one who purchases the same for value. Suppose we concede this to be the law, what can it avail plaintiff in error? The testimony of Mr. Hannan is not that he suspected that there was something wrong about the note or that he had knowledge of facts which might have put him on inquiry. On the contrary, his testimony establishes positive knowledge on his part of the original infirmity in the note. He says:

"I had *learned* from Mr. Crane of the transaction he had with Mr. Moore and he had advised me of the details of the deal" (Record p 56), and further: "*I knew* full well what the note was given for" (Record p. 57), and again: "I state that *I knew all about the consideration* for the original note" (Record p. 58).

This is not a case of suspicion on the part of the purchaser of a promissory note or knowledge of circumstances that should cause a prudent man to look further, but a case of actual, positive knowledge on the part of the purchaser, so that if Mr. Hannan is to be believed, and a jury had a right to and did believe him, his knowledge of the original transaction was as full as that of the payee of the note. We submit if there were no testimony in the case except that of Mr. Hannan, and the record does not disclose but that there was other testimony, that alone would be ample to sustain the finding of the jury on the question of knowledge of the plaintiff bank's assignor.

But it is claimed that the defendant in error is estopped from taking advantage of the fraud practiced upon him, in obtaining the original note, of which the bank had knowledge, by his act in renewing the original note, the renewal note being the one sued on in this action. If Mr. Moore, with full knowledge of the original fraud, and with full knowledge that the bank was a party to that fraud, renewed the note, he would doubtless have estopped himself from defending on the ground of fraud, but

the evidence is ample in this case for the jury to find, and they did find under the instructions of the court, that Mr. Moore not only did not have knowledge of the fraud at the time of making the original note, but that the renewal note was obtained from him by the false and fraudulent representations of the bank, to the effect that it had acquired the note for value, before maturity, without notice.

Mr. Hannan says: "I wrote Mr. Moore many letters or caused them to be written in behalf of the Citizens' State Bank of Council Bluffs, *always claiming that the bank had acquired the entire note in good faith, for value and without notice,* as the letters written by me while in the bank will show. * * I said anything and everything I could to get a little money out of the note." (Record p. 59.)

Mr. Moore testified, in response to a question as to what induced him to give the renewal note in suit:

"I was led to believe that the bank had purchased the note in good faith; that no matter what my impressions were as to the original deal, that if the bank became the possessor of them as an innocent purchaser there was no recourse for me but to pay the notes. I kept renewing the notes, expecting to do so." (Record, p. 94.)

And again: That he did not learn that the bank had knowledge of the circumstances under which he gave the note, until Mr. Hannan's deposition was read at a former trial of the case. (Record pp. 93, 94.)

Upon this evidence, and much of the same character, the court submitted to the jury the question as to whether or not the renewal of the original note was obtained from the defendant in error by the bank, through false and fraudulent representations. If the original note was void as between the parties; if the bank could not have recovered on the original note by reason of the original fraud and its knowledge thereof at the time of the note's acquisition, and it induced a renewal by making false representations to the maker, this renewal note would stand on no higher plane than the original.

Rash v. Farley, 91 Kentucky 344; 34 American State Reports 233.

In this case the original note was void, having been given in violation of a statute. The holder of the note agreed with the maker that the validity thereof should, as between themselves, be determined by the decision in an action which the holder was then prosecuting against the maker of a similar note. The holder subsequently induced the maker, by means of false representations as to the result of that action, to execute a renewal. The court held, upon his seeking to enforce the new note, that it would be treated as if he had sued on the original and if the latter was void, he would be precluded from recovery, and says:

"It is alleged substantially in the answer, and not being denied, must be taken as true, that there was an

agreement between appellants and appellee, before the note sued on was executed, that they would abide the decision of the case of appellant against Holloway, and that he, appellee, who resided in the county and was ignorant on the subject, was deceived, and induced to execute the note in renewal of the original by false information sent to him by appellant for the purpose of inducing him to execute it, which he would not have otherwise done. In such case, it seems to us, appellant must be treated as he would have been holding and asking judgment on the original note, which was made by statute void."

It certainly does not require argument or the citation of authority to establish the law to be that if the bank could not have recovered on its original note, on account of its privity with its fraudulent inception, it certainly could not put itself in a better position by obtaining a *new note* through a *new fraud*. This principle is necessarily destructive of the elaborate argument of counsel for plaintiff in error on the question of novation. Even if we concede that there was a novation and Moore was induced to participate in this novation through the fraudulent misrepresentations of the bank, the renewal note would have no better standing than the original note.

But there is nothing approaching a novation in this case, and no evidence introduced or offered that would have established a novation. As we understand the claim of plaintiff in error, it is this: That, as Moore owed Crane, and Crane owed the bank, the renewal of Moore's note through the bank and the release of Crane, constituted a novation. The transactions, all taken together,

lack so many of the essential elements of a novation that the contention seems hardly worthy of serious consideration.

First. In order to constitute a novation, the consideration moving to Moore for the execution of the renewal note, must have been an agreement on the part of the bank to release Crane. This element is entirely lacking. There was no request on the part of Moore that the bank should release Crane, and no agreement on the part of the bank to release Crane. So far as the evidence shows, the question of releasing Crane was never discussed between Moore and the bank. All the evidence on the subject shows that the inducement to Moore to execute the renewal note was the fact that, relying upon the statements of the bank's cashier, he believed the old note to have been purchased by the bank in good faith, and in the regular course of business, and supposed that the bank owned this note, that Crane was no longer a party thereto, and that the bank had a valid, subsisting claim against him, which it could enforce.

Second. A novation requires three parties. It has been the theory of the plaintiff in error throughout this case that it acquired the original note from Crane before maturity, and for a valuable consideration; that it became the owner of the obligation; that by the transfer from Crane to the bank the debt, which had theretofore been

due from Moore to Crane, became due from Moore to the bank. If the title to Moore's note had passed from Crane to the bank no novation would or could arise by the bank obtaining a renewal of the same. If it saw fit, after obtaining this renewal, to release Crane, that was a purely voluntary matter on its part. After the transfer from Crane to the bank it owed no duty to Crane, except the duty of diligence in the collection of this note as collateral and the application of the proceeds of the collection upon Crane's original indebtedness.

Third. A novation requires the meeting of three minds. There is nothing in the evidence in this case showing, or tending to show, that the minds of Moore and the bank had ever met upon the question of a shifting of obligations. While it may be true that if Moore and the bank had agreed upon a release of Crane, Crane would have had a right to come in at a later time and ratify the agreement. But the record is entirely without testimony indicating that the question of the release of Crane had ever been a subject of negotiation or consideration between Moore and the bank.

The court was, therefore, correct in giving the instruction that was the basis of the fourteenth assignment of error, and in telling the jury that there was no novation in the case, as there was nothing, either in the evidence or in the pleadings, to justify any claim of a novation.

III.

It can hardly be conceived that counsel for plaintiff in error can be serious in the discussion of his fourth assignment of error. His claim, as we understand it, is that it was error to admit oral evidence of the negotiations between Moore and Crane and Bellinger, on the ground that the negotiations had merged in a written contract. The issue was fraud. The defendant in error claimed that he had been induced to make himself a party to these writings by the fraudulent misrepresentations on the part of Crane and Bellinger, which preceded the writing. It would be strange, indeed, for a court to hold that where a contract is attacked as having been procured by fraudulent misrepresentations, the party claiming to have been defrauded cannot give evidence of the misrepresentations, but is bound by the writing itself, which is the result of the fraud.

So, also, of the claim made that the transaction was not between Moore and Bellinger, but between the corporation and Crane and Bellinger, is equally without merit. The corporation was nothing more or less than a vehicle to carry the scheme which had been laid by Crane and Bellinger to obtain Moore's money for an interest in this worthless compound.

IV.

We have previously discussed the question of novation, and it is unnecessary, in considering the fifth assignment of error, to repeat what has been said on that subject. As we have heretofore shown, the evidence offered would not have established a novation. Plaintiff in error was not entitled to prove a novation, as there was nothing in the pleadings to suggest that a novation was claimed. It was entirely outside the issues. The issues were fraud and want of consideration in obtaining the execution of the original note, actual knowledge of that fraud on the part of the endorsee bank, and fraudulent representations by the bank to induce a renewal of the note. How could it be material whether the contract of renewal was a novation or some other form of contract, provided it was induced by fraud? If the renewal was not induced by fraud, plaintiff would have had the right to recover in any event. If it was induced by fraud, it was immaterial whether the contract assumed the form of a novation or some other form.

V.

The eighth assignment of error rests upon the refusal of the court to give instructions numbered five and eight, requested by the plaintiff in error. (Record pp. 146, 147.) This assignment cannot be considered, for the reasons heretofore advanced in Paragraph III of our

argument on the motion in this brief. No proper exceptions were taken to the refusal of the court to give instructions numbered five and eight, requested by the plaintiff in error, the exception having been lumped with other exceptions. (Record pp. 158, 159). As we fully discussed this question in the brief to our motion, we will at this point do nothing further than to refer to that discussion. But the court committed no error in refusing these instructions. They are too broad. The court charged the jury correctly on the question of the necessity of reliance upon the representations made, in order to constitute a defense, telling the jury that, in order for them to find for the defendant they must find, not only that the fraudulent representations were made, but that the defendant relied upon the same in signing the note. (Record p. 152.) Plaintiff in error cannot complain because the principle of law for which he contends was not stated in the exact language he asked.

VI.

The tenth assignment of error, which is based upon the refusal of the court to give the seventh and ninth requests asked by the plaintiff in error (Record p. 147), falls in the same category as the assignment last discussed. No proper exception was taken to the refusal of the court to give these instructions. Besides, the court charged the jury fully and correctly upon the question

involved in these requests, telling the jury specifically that, in order for them to find for the defendant, they must find that the representations made were false and fraudulent and known so to be by Crane and Bellinger. (Record pp. 152, 153.)

VII.

Eleventh assignment of error. The instruction complained of in this assignment was not excepted to by the plaintiff in error, except in so far as it states that the knowledge of Hannan, or any information which he might have which would put a prudent man upon inquiry, was to be imputed to the bank. (Record p. 159.) It was an undisputed fact in the case that Hannan, as cashier of the Citizens' State Bank, acted for the bank exclusively in this transaction; that so far as the bank's dealing was concerned, it was carried on entirely by Hannan. Therefore, there can be no error in the statement of the court that Hannan's knowledge was the bank's knowledge.

In discussing the eleventh assignment of error, counsel for the plaintiff in error repeat the argument theretofore made upon the sufficiency of Hannan's testimony to justify the court to submit the case to a jury. We think we have already thoroughly covered that question, but again submit:

First. That for reasons heretofore given the evidence was ample.

Second. As all the evidence is not before the court there is a conclusive presumption that there was evidence other than Hannan's which justified the court in submitting the case to a jury.

In connection with this discussion, it is pertinent to observe that on the question of the good faith of the Citizens' State Bank in the purchase of this paper, the burden of proof was upon the plaintiff to establish that the bank purchased the paper in good faith, for a valuable consideration and without notice of the fraud.

Daniel on Negotiable Instruments, Section 815, and cases cited.

We quote from Mr. Daniel:

"The principle is well established that if the maker or acceptor, who is primarily liable for payment of the instrument, or any party bound by the original consideration, proves that there was fraud or illegality in the inception of the instrument, or, if the circumstances raise a strong suspicion of fraud or illegality, the owner must then respond by showing that he acquired it *bona fide* for value, in the usual course of business, while current, and under circumstances which create no presumption that he knew the facts which impeach its validity. This principle is obviously salutary, for the presumption is natural that an instrument so issued would be quickly transferred to another, and unless he gave value, which could be easily proved if given, it would perpetrate great injustice, and reward fraud to permit him to recover."

With the burden resting upon the plaintiff to establish the good faith of the Citizens' State Bank, and the cashier of that bank confessing on oath that he knew of the vice with which the paper was tainted, it is idle for the plaintiff to contend that there was no evidence to be submitted to a jury upon the issue of knowledge on the part of the bank.

But at this point counsel present the question that the court by this instruction places a greater burden upon the purchasers of commercial paper than there rests under the general rules announced by the Federal Courts. That suspicion or notice of facts sufficient to put a prudent man upon inquiry is not, according to the Federal authorities, sufficient to invalidate commercial paper in the hands of a purchaser for value, and that, therefore, the court in its instruction on the question of notice committed error. The instruction complained of may be found on pages 150, 151 and 152 of the record. If this instruction be error, plaintiff in error cannot avail itself thereof, as it is exactly in line with the request to instruct made by the plaintiff. In fact, the first part of the instruction is in the exact language of plaintiff's request. (See request Number 4, Record p. 146.) In making this request, it adopted the theory that in order to purge the bank and its officers of complicity with the original fraud, it was necessary that they should "*know of nothing to*

apprise them or put them upon inquiry with respect to the claim now made by the defendant that the note was given without consideration or procured by fraud." The court charged exactly as the plaintiff asked in that regard, and then instructed the jury the converse of that proposition, namely: That if the bank or its officers did know of facts sufficient to put them on inquiry, that fact would taint the paper in the hands of the bank. It is noticeable that the defendant's requests to charge, which the court gave, were absolutely correct in this particular. (Record pp. 152-154.) It is well established that one who procures error to be committed by the court or acquiesces in such error is estopped from claiming any advantage therefrom.

Ry. Co. v. Bank, 135 U. S. 432;

Bracken v. Ry. Co., 21 C. C. A. 307; 73 Federal 347;

Harper v. Moss, 114 Missouri 317; 21 Southwestern 517;

Snyder v. Snyder, 142 Illinois 60; 31 Northeastern 303;

Wilson v. Zook, 69 Missouri 69; 13 Southwestern 351;

Ft. Scott, etc., Co. v. Fortney, 51 Kansas 287; 32 Pacific 904;

City of Kansas v. Orr, 62 Kansas 61; 61 Pacific 397-399;

Silsby v. Car Co., 95 Michigan 204; 54 Northwestern 761.

If the court did commit error in this instruction, it was lead into that error, not by the defendant, but by the plaintiff. The instruction presented by the plaintiff clearly indicated to the court that its theory was that facts sufficient to apprise the bank or put it upon inquiry was all that was required. Certainly a party will not be allowed to trap a court into error and then use this error to his own advantage.

VIII.

Twelfth and thirteenth assignments of error. These assignments of error are based upon instructions given. No exception was taken thereto except the general exception heretofore discussed. Therefore, these instructions may be considered as not having been excepted to at all, under rules previously discussed. But in any event, the instructions are entirely correct.

The defense in this case was not that Bellinger did not furnish medicines to the corporation, or that Bellinger violated any contract with the corporation. The defense is that the defendant purchased an interest in a formula represented to be of a certain character and capable of accomplishing certain results. That, as a matter of fact, these representations were false and fraudulent, and that Moore got nothing for his note, except a fifth interest in a piece of blank paper. The evidence, includ-

ing the evidence of Bellinger himself, is overwhelming and conclusively establishes that this pretended formula never had any existence.

IX.

Fifteenth assignment of error. Counsel complains of the charge of the court as to the burden of proof. They cite no authority to sustain their contention. As we previously pointed out and sustained by an abundance of authority, the burden of proof, under the circumstances of this case, rested upon the plaintiff, so far as required it to establish the purchase of the paper in good faith, for value, and without notice of the fraud. The court committed no error in so charging.

We submit that there is no prejudicial error in the record, and that the judgment should be affirmed.

L. C. GILMAN and
M. M. LYTER,
Attorneys for Defendant in Error.

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No. 1323

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

FIRST NATIONAL BANK of Council Bluffs, Iowa,	*Plaintiff in Error,*
vs.	
J. A. MOORE,	*Defendant in Error.*

REPLY BRIEF OF PLAINTIFF IN ERROR

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

JAMES KIEFER and
JAMES McNENY,
Attorneys for Plaintiff in Error.

Seattle, Washington.

Lowman & Hanford Stationery and Printing Co., Seattle, Wash.

FILED
JUN 18 1906

IN THE

UNITED STATES

CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

FIRST NATIONAL BANK of Council Bluffs, Iowa, *Plaintiff in Error,* vs. J. A. MOORE, *Defendant in Error.*	No. 1323

REPLY BRIEF OF PLAINTIFF IN ERROR

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

ARGUMENT ON MOTION TO STRIKE BILL OF EXTION AND TO DISREGARD ASSIGNMENT.

The first point of counsel for defendant in error is not altogether clear. Apparently they object to the bill of exceptions as found in the record, because it was prepared and settled as a whole instead of in parts. So far as can be judged from their argument and motion, counsel seem to think that a separate bill of exceptions must be settled for each exception saved during the trial. If this is the

correct rule, then it will be necessary to repeat the testimony each time that an objection is unsuccessfully made to the same line of testimony, and exception saved, and go on accumulating this testimony and repeating it indefinitely. Furthermore, where the sufficiency of the entire testimony is challenged unsuccessfully and exception saved, it would be necessary, according to counsel's theory, to repeat all of the testimony which had gone before and put it into a final bill showing the exception to the refusal of the Court to give the peremptory instruction prayed for. Counsel has not cited any cases, and we venture to say cannot cite any cases, requiring this to be done.

The bill of exceptions in this case is very different from that in the case of *Frank Waterhouse, Ltd., vs. Rock Island Alaska Mining Co.*, 97 Federal 466. The bill of exceptions found in the record in this case (Record 34-161) is not amenable to the objections urged by counsel. An examination of the bill of exceptions in this record would show that it contains the testimony as to purely formal matters in narrative form, the exhibits in full, and the principal testimony on behalf of the defendant in question and answer, the request for instructions on behalf of the plaintiff, the charge of the Court in full, and the exceptions saved thereto. It is not, as counsel says, intermingled with colloquies between counsel and the Court and between respective counsel. It is true that it is not split up into from twenty to fifty chapters dividing what occurred at the trial, but it does show, in an orderly and systematic manner, the entire proceedings of the trial.

The arrangement contended for by counsel for defendant in error might be applicable where the only errors urged related to the admission or rejection of evidence or an exception to one or two paragraphs of a charge based upon a small portion of the evidence. It certainly is not applicable to the review of an entire case.

This case went to the jury upon two, and only two, propositions of fact: First, was there a fraud in the procurement of the original note, the renewals of which are here in suit, and, second, was the assignor of plaintiff in error, the Citizen's State Bank, a purchaser for value without notice? We fail to see how the arrangement of the bill of exceptions could be improved upon.

Counsel make the further point that we have not, in our assignment based upon the instructions of the Court, set out in full the testimony claimed to make the instruction or refusal erroneous. The rules in this court (Rule 11) respecting assignments, contain no such requirement. The rule does require that an assignment based upon the rejection or admission of evidence must quote the testimony in full, and that an assignment based upon an instruction given or refused must quote the instruction. This makes a clear distinction. We certainly have complied with the rule.

Suppose counsel's theory is followed, what is the result? A large amount of testimony may be taken upon a particular proposition of fact, and one party presents two or three instructions embodying different questions of law applicable to this proposition. They are refused by the Court. Upon writ of error assigning the refusal of these instructions as error, this testimony must be printed in the bill of exceptions, and in embodying each exception must be printed two or three times again, or at best referred to in such a manner as to enable the Court to hunt it in the record. The burdensomeness of this practice can readily be seen.

Neither this Court nor any other Appellate Court has ever rendered any decision within the knowledge of counsel requiring such useless repetition. None of the cases cited by counsel sustain the contention of counsel in this

respect. It is the office of the brief to point out the testimony making the instruction erroneous or correct.

The cases referred to in 80 Federal 228-638 are evidently decided by the Court for failure to point out the evidence in the brief. The rules of the Fourth Circuit require the testimony to be set out with the assignment in the brief. If we are correct in our understanding of the cases we have no criticism to offer of the rule there laid down. If, however, it is based upon a rule such as we have in this Circuit respecting assignment, then it does seem to us that the rules should be amended so as to show exactly the requirements of the Court. It seems to us to require no argument to show the injustice of defining in the rules what is required and then punishing counsel for not putting into the record something not required by the rules.

There has never been a decision in this Circuit requiring counsel to incorporate in an assignment based upon the giving or refusal of instructions, the evidence claimed to show the error in the action of the trial Court.

If this rule is adopted by the Court it seems to us that it should be adopted as a rule and not visited upon the parties in a particular case who have brought themselves within the terms of an existing rule.

Counsel for defendant in error contend that our assignments of error 7, 8, 9, 10, 12, 13, 14 and 15 cannot be considered because no proper exception was taken. On page 15 of their brief, counsel correctly quote the manner of taking our exceptions. They omit, however, to refer to the local rule found at page 158 of the record. The contention of counsel upon this proposition seems to us a simple play upon words. In the face of the rule they would hardly have the hardihood to contend that we

could not identify the portions excepted to by number of paragraph.

It then comes down to this, and only this, that instead of proceeding as we did we should have repeated between each paragraph these words, "Plaintiff excepts to the refusal of the Court to give instruction No. 1," and then repeat these words again and use the figure 5, and so on indefinitely until the end of the instructions was reached. We are unable to see the virtue of this repetition or the necessity for it.

The theory of the giving or refusal of an instruction in the Federal Courts, and we may say in all Courts, is to enable the trial Court, if he wishes, to correct his rulings, and the object of the rule requiring the number to be specified is to enable the Court to see just what is objected to and if error has been committed, corrected before the jury retires.

The local rule found in the record 158 dispenses with the taking of exceptions before the jury retires, and distinctly prescribes how a portion or portions of the charge excepted to shall be identified.

Counsel for plaintiff in error have endeavored to abbreviate the record and have felt such endeavor to be meritorious. If the contention of counsel for the defendant in error is sustained, a premium will be placed upon prolixity and encumbering the record with useless matter.

Upon this point we cite: "A statutory requirement that instructions shall be numbered is held to be for the convenience of the Court and counsel in saving exceptions."

Railway Co. vs. Ward, 4 Colo. 36.
Poston vs. Smith's Executor, 71 Ky. 589.
Mann vs. Railway Co., 46 Iowa 637.

We venture to say that none of the cases cited by counsel for defendant in error was based upon such a local rule as we have in this district. When counsel have complied with the local rule we submit that they should not be punished therefor, by requiring them to conform to some other and different standard.

The greater part of the cases relied upon by counsel for defendant in error and the greater mass of the cases laying down the same rules, will be found upon a close examination to be based upon general exceptions to an entire charge, without any reference to any particular part or parts for identification. The reason of the rule is that counsel were required to be fair with the trial Court. How could anything be fairer than to refer him to the number of the paragraph in his charge as given or in the charge as refused. He could not be mistaken as to what counsel referred to and this Court has no difficulty in ascertaining what was excepted to.

We submit, therefore, that the motion to strike the bill of exceptions and to disregard the assignment of error should be denied.

ARGUMENT ON THE MERITS.

Counsel for defendant in error make the point that the bill of exceptions is insufficient to present the question of the right of the plaintiff in error to have a peremptory instruction in its favor. In considering this question the Court should look not only to the certificate appended to the bill of exceptions, but at the entire bill itself.

In *Gunnison County Commissioners vs. Rollins & Sons,* 173 U. S. 255, at page 62, the Supreme Court in discussing this question say that the Court should look beyond the certificate and examine the bill itself to ascertain whether

it contains all the evidence, so as to permit of an entire review of the case.

An examination of the bill in this case will show that the case was tried upon two defenses, viz: the Statute of Limitations and fraud, and that in the progress of the trial the defendant's own testimony eliminated the question of the Statute of Limitations and the Court charged it out of the case. Some attempt was also made to dispute the legality of the transfer of the paper from the Citizen's State Bank to the plaintiff in error. This also fell out in the progress of the trial and was abandoned. The case went to the jury upon the question of fraud in the obtaining of the original note of which these notes sued upon are renewals and the knowledge of the Citizen's State Bank of such fraud. Therefore in making up the bill of exceptions it became necessary under the repeated decisions of the Supreme Court, to embody only the evidence upon which the case actually went to the jury, and this we have done.

An examination of the bill will disclose that it contains, in narrative form in part and in part by question and answer, all of the evidence relating to the issues upon which the case was finally submitted, and just so much of the evidence as was so intermingled with it as to require its presence in the bill in order to make it intelligible. No one can read the exceptions and come to any other conclusion than that it contains all the evidence upon the issues submitted to the jury. The dropping out of these defenses explains the form of the certificates. We submit that the certificate is sufficient to review the entire case.

Tormley vs. Chicago, Milwaukee & St. Paul Ry. Co., 53 Wis. 626.

Waldron vs. Waldron, 156 U. S. 361.

II.

Counsel for defendant in error contend that we are responsible for the charge of the Court complained of in our eleventh assignment of error. Pages 42 and 43 of their brief are devoted to a discussion of this question. An examination of the instruction prayed by us, as found in the record at page 146, request 4 and of that ~~question~~ by the Court (record 151, 152), shows this argument of the defendant in error is fallacious.

For convenience of comparison we print the two instructions ~~complained of~~ in parallel columns, and ask the indulgence of the Court for this departure from the usual form of briefs.

"If the jury find from the evidence that when the Citizen's State Bank of Council Bluffs, Iowa, received the note made by the defendant for $5,000, in favor of George J. Crane, in March, 1893, the officers of the said bank knew of nothing to apprise them or put them upon inquiry that the said note was given without consideration or procured by fraud, the verdict of the jury will be for the plaintiff for full amount sued for."

"If the jury find from the evidence that when the Citizen's State Bank of Council Bluffs, Iowa, received the note made by the defendant for five thousand dollars, in favor of George J. Crane, in March, 1893, the officers of said bank knew of nothing to apprise them or put them upon inquiry *with respect to the claim now made by the defendant*, that the note was given without consideration or procured by fraud, the verdict of the jury will be for the plaintiff the full amount sued for."

Now, gentlemen of the jury, there is a question in the case as to which there is a conflict of testimony,

and it is referred to the jury to decide what the truth about it is, whether there was a knowledge on the part of the cashier, or whoever acted for the Citizen's State Bank of Council Bluffs, at the time of receiving that five thousand dollar note. It is shown by uncontradicted evidence that the transaction was through Mr. Hannan, who was an officer of that bank at that time, and whose deposition has been taken in this case. Mr. Hannan will be presumed as the result of the uncontradicted testimony in the case to have been authorized to act for the bank in that matter, and any knowledge or information which he had on the subject is to be imputed to his principal the bank for which he was acting, and the jury must determine this question of whether he knew of the fact Mr. Moore had been swindled (if in fact he was swindled) in the transaction by which the note was obtained by him.

In determining that question, you are to consider all the facts and circumstances attending the transaction, and showing what knowledge Mr. Hannan did have in regard to the maker and

the payees of the note, and in regard to their dealings together with respect to that note, *and the circumstances under which the note was obtained, and determine from a consideration of the testimony whether the evidence shows that Mr. Hannan did know of enough of the transaction to have put a prudent man on inquiry before accepting the note as a purchaser of it in good faith. The bank is chargeable not only with the knowledge which Mr. Hannan actually did have, but if there was some knowledge on his part, which should have been a warning to him, and would have caused a prudent business man to have made inquiry, then the bank is chargeable with all the knowledge which might have been obtained by an inquiry, and if there was a swindle practiced, and the bank, through Mr. Hannan, knew it or should have known it, then the note was equally void in the hands of that bank* as in the hands of Crane and Bellinger, and if void in the hands of the Citizen's National Bank, it is likewise void in the hands of the plaintiff bank."

The instruction as requested by us simply asks the Court to announce the Federal rule and we are certainly not responsible for any erroneous elaboration indulged in by the Court.

A specific exception taken by us and found in the record at page 159, shows plainly that there was no misunderstanding between the Court and counsel on that point, and that the counsel for plaintiff in error then occupied the same position on that question as they now occupy. On this point we cite:

> *O'Niell vs. Orr,* 5 Ill. 1.
> *Blough vs. Parry,* 43 Northeastern 46.

Counsel for plaintiff in error are certainly not responsible for the departure of the Court from the true Federal rule upon this question. By comparing the two instructions above printed, it will be seen that the Court changed and modified the instruction requested by us and then proceeded to enlarge upon the instruction given. What we asked for was the true Federal rule, viz: that unless the officers of the Citizen's State Bank knew of sufficient facts to discredit the paper or to put them upon inquiry respecting the origin of the paper, the plaintiff must recover.

The instruction requested is based wholly upon the knowledge of the officers, that is to to say their knowledge must go so far as to be either positive knowledge of the facts, or such knowledge of the facts as to compel them to make inquiry. We did not go to the extent to which the Court went and there is nothing in the instruction or in the record elsewhere to indicate that counsel adopted the theory laid down by the Court in the instruction complained of.

The exception shown on page 159 of the record shows exactly what our position was at that time.

The cases cited by counsel for defendant in error at page 43 of their brief are not in point. The case in 135 U. S. is a case of acquiescence of the plaintiff in error in an erroneous ruling made by the Court below. The case of *Bracken vs. Railway Co.* is one where the Court gave an instruction as prayed in the language of the plaintiff in error. In *Harper vs. Moss,* it appears that the plaintiff in error had given evidence in support of the theory of the case, and the Court charged favorably to the theory. In the case of 51 Kan. the Court gave the instruction in the exact language asked by counsel. None of these cases are in point. The instruction complained of is certainly erroneous. The Court in effect told the jury at record 152, that if Mr. Hannan had, not merely knowledge but suspicion, that something was wrong with the paper, the bank would be bound, not only by what he did know but by anything which he might have found out by inquiry. This was certainly allowing the defendant in error to go to the jury upon a mere possible suspicion.

We reiterate that an examination of Hannan's testimony will show that he has not testified to any knowledge, or even suspicion, on his part that the note was unlawfully and improperly acquired, and that there was anything illegal or crooked in the transaction out of which the note grew.

Finally upon this point we desire to suggest that this instruction was improper because the evidence of the defendant and the evidence of Crane as pointed out in our opening brief shows that if the bank had made inquiry they would not have learned of anything to impeach the paper, but would have been encouraged to buy it.

Moore says in his testimony (record 94) and in his letter of February 28 (record 108) that he did not know that there was anything wrong with the transaction until long after the renewal of the paper. We urge as in our opening brief that Hannan's testimony does not show that he had the least inkling of any illegality in the transaction in which the paper was given. There was nothing illegal or contrary to public policy in the selling of such a cure, and Hannan does not say, or even hint, that he knew that it was done in an illegal manner, something which we do not at all concede.

II.

Counsel for defendant in error are mistaken in their claim that the facts in this case do not make out a novation. We feel satisfied that the authorities cited by us in our opening brief, demonstrate that it is not necessary in order to constitute a novation that all three of the parties should meet at the same time. It is enough if two of them make a contract for the benefit of the third, and he accepts it promptly when it comes to his knowledge. Moore, in making the contract of renewal with the bank, acted upon the knowledge and information which he then had and it will not do to now allow him to change his ground. Any contract and any settlement or adjustment of any matter could not be considered complete or final if the parties to it are to be permitted, after the lapse of years, to repudiate obligations entered into because of after-acquired information.

Counsel for defendant in error cites the case of *Rash vs. Farley,* which is not at all in point. That case turned upon a subsequent agreement between the parties by which both agreed to abide the event of a certain suit. There was at least the implied agreement on both sides to honestly

inform each other as to the result of such action. There is nothing of the sort in this case. The Citizen's State Bank and J. A. Moore were dealing at arms-length with respect to the renewal of this note and the bank was merely asserting an alleged right. It was the business of Moore before he acted upon that to know, and he was bound to know, at his peril, the nature and extent of the soundness of the bank's claim. Furthermore according to Moore's own testimony that question was not seriously raised. Moore says that he was not at that time conscious that the consideration for his paper had in any wise failed and that he was very glad to renew the paper. This is shown by exhibit R, record 108, and Moore's testimony (record 118).

We submit, therefore, that the judgment of the trial Court should be reversed and the record sent down with instructions to enter a judgment in favor of the plaintiff in error for the full amount of plaintiff's claim, and if we are mistaken in that view, that it should be reversed because of the error in the instructions, and the record remitted with instructions to grant a new trial.

Respectfully submitted,

JAMES KIEFER and
JAMES McNENY,
Attorneys for Plaintiff in Error.

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No. 1323

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FIRST NATIONAL BANK OF COUNCIL BLUFFS, IOWA,
Plaintiff in Error,

vs.

J. A. MOORE, *Defendant in Error.*

Petition of Plaintiff in Error for Re-hearing in Part, Modification of Opinion and for Final Judgment.

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

JAMES KIEFER and
JAMES McNENY,
Seattle, Washington. *Attorneys for Plaintiff in Error.*

Lowman & Hanford Stationery and Printing Co., Seattle, Wash.

FILED
OCT 1 0 1906

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FIRST NATIONAL BANK OF COUNCIL BLUFFS, IOWA, *Plaintiff in Error,* vs. J. A. MOORE, *Defendant in Error.*	No. 1323

Petition of Plaintiff in Error for Re-hearing in Part, Modification of Opinion and for Final Judgment.

UPON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE WESTERN DISTRICT OF WASHINGTON.

To the Honorable, the Judges of the above entitled Court:

The plaintiff in error respectfully petitions the Court to modify its opinion filed herein, on the first day of October, 1906, by directing the trial court to sustain the motion of the plaintiff in error for judgment, notwithstanding the verdict, and to enter judgment for the plaintiff in error for the full amount claimed in its complaint, and

for attorneys' fees and costs, upon the following grounds and for the following reasons:

I.

Counsel for plaintiff in error will endeavor to very briefly point out the state of the record, and the grounds upon which they ask this Court to finally end this litigation. At the close of the evidence counsel moved the trial court to direct the jury to find for the plaintiff in error, and in the opinion filed this Court holds that the evidence on the part of the defendant was insufficient to take the case to the jury, and that the motion should have been granted, and the peremptory instruction given.

Our 16th assignment of error, found on page 178 of the record, is predicated upon the refusal of the trial court to grant our motion for judgment notwithstanding the verdict. The motion itself is found at pages 27 and 28 of the record, and the order denying the motion is found at pages 31 and 32 of the record. The record, on pages 159 and 160, shows that the plaintiff in error seasonably saved its exceptions to the action of the court.

In our brief, pages 26, 27 and 40, we discussed this question and will not here repeat our discussion, and will content ourselves with a single proposition, viz.: The right of a plaintiff in the Circuit Court of the United States to have a judgment notwithstanding an adverse verdict.

We think it must be admitted that we have properly saved our exceptions, and that if, under the practice of the State of Washington, we are entitled to a judgment notwithstanding the adverse verdict, we should have it in this case. This Court, in *United States vs. Gardner*, 133 Federal, page 285, says, at page 288, after discussing the entry of judgment *non obstante veredicto* at common

law, and announcing the principle that it could only be granted upon the application of the plaintiff, and upon a plea to the declaration, which confessed the cause of action and set up matters in avoidance, which, upon their face, were insufficient to constitute a defense or a bar, goes on to say:

"The rule has been relaxed in most of the states so far as to permit a judgment on the pleadings, notwithstanding the verdict in behalf of either the plaintiff or the defendant. We find no statute of Washington or decision of the Supreme Court of the State of Washington further relaxing the rule so far as to permit the consideration of evidence in the case."

This Court was wholly correct in that holding as the law of the State then stood. Since that decision, however, and on the 2nd day of February of the present year, the Supreme Court of the State of Washington, in the case of *Roe vs. The Standard Furniture Company* (not yet reported), discussed this identical question. That was an action for personal injuries, and after all the evidence was in the defendant challenged the evidence and moved for a directed verdict. The Court denied the motion and submitted the case to the jury, who rendered a verdict for the plaintiff, and defendant moved for a new trial and separately moved for judgment, notwithstanding the verdict upon the same grounds as those upon which it had asked for a directed verdict. The trial court granted the motion for judgment, notwithstanding the verdict.

Upon appeal by plaintiff, the Court says:

In support of his position appellant cites numerous authorities, including 11 Ency. Plead. & Prac., 917-921, on which he places special reliance, and further insists that no section of our code provides for a judgment *non ob-*

stante veredicto, after a cause has been submitted to a jury and their verdict has been returned; that after verdict a defendant's only remedy is by motion for a new trial, and that the jury being the exclusive judges of the facts, when the evidence has once been submitted to them, the court can only grant a rehearing.

There is no doubt but that the early common law rule as stated by appellant is historically correct, but the practice in this state has been modified, and such modification is warranted by certain provisions of our code hereinafter mentioned. If the rule of practice contended for by appellant as pertinent to a motion for judgment *non obstante veredicto* be approved, then no available method would exist by which a trial court could correct its own mistake in erroneously submitting a case to the jury, other than that of granting a motion for a new trial, and such new trial would have to be granted, even though it was indisputably apparent that a plaintiff had no possible right of recovery. Bal Code, § 6521, provides:

> "Upon an appeal from a judgment or order . . . the supreme court may affirm, reverse or modify any such judgment or order appealed from, as to any or all the parties, and may direct the proper judgment or order to be entered, or direct a new trial or further proceedings to be had . . ."

Assuming that the trial court erred in denying respondent's motion for a directed verdict, if it had thereafter entered final judgment upon the verdict returned, this court upon an appeal based on proper assignments of error, would not only order a reversal, but would also direct a final judgment dismissing the action. This being true, the trial court should be permitted to make the order without the necessity of an appeal. Bal. Code, § 5056, after providing that this court on appeal may review orders, rulings, or decisions to

which no exceptions need be taken, and also those to which proper exceptions have been taken, contains the following language:

"And any such alleged error shall also be considered in the court wherein or by a judge where of the same was committed, upon the hearing and decision of a motion for a new trial, a motion for judgment, notwithstanding a verdict, or a motion to set aside a referee's report or decision, made by a party against whom the ruling or decision to be reviewed was made, whether the alleged erroneous ruling or decision is a part of the record or not, where the alleged error, if found to exist, would materially affect the decision of the motion."

This court has repeatedly reviewed decisions of trial courts refusing to direct verdicts, and we are of the opinion that it is the proper practice for a trial court, upon the hearing of a motion for judgment *non obstante veredicto*, to enter final judgment in favor of either party where it is warranted by the undisputed evidence. The facts being undisputed, it becomes the duty of the court to apply the law, there being no issue to submit to a jury. While the above rule of practice may not have been heretofore expressly announced by us, we have nevertheless in a number of cases put it into practical effect and recognized the principle above enunciated. *Larson v. American Bridge Co.*, 1 Wash. Dec. 438, 82 Pac. 294; *Dyer v. Middle Kittitas Irr. Dist.*, 1 Wash. Dec. 449, 28 Pac. 301; *Bancroft v. Godwin*, 2 Wash. Dec. 332, 82 Pac. —.

In *Larson v. American Bridge Co., supra*, the defendant challenged the sufficiency of the evidence, and moved for a dismissal of the action. This challenge being denied, a general verdict was returned in favor of the plaintiff, and special interrogatories submitted at the request of the defendant on the question of independent contractor were answered against the defendant's contention. A new trial being granted, the plaintiff appealed. This court having found that neither the general

verdict nor the answers to the special interrogatories were supported by the evidence, speaking through Hadley, J., said:

"When ruling upon the motion for new trial, the court stated that, as there was no competent evidence whatever to sustain the findings, they would be set aside. The court was then convinced that it had misapprehended the evidence at the time respondent interposed its challenge thereto. Such was clearing the case, and it was not error to set aside the findings and also the general verdict. Respondent asks, inasmuch as the evidence shows no cause of action against it, that the cause shall be remanded with instructions to dismiss the action. We think this request should be granted. Respondent was entitled at the trial to have its challenge to the evidence sustained, and it is still entitled to it. *Bernhard v. Reeves,* 6 Wash. 424, Pac. 873."

In *Dyer v. Middle Kittitas Irr. Dist.,* on a jury trial, the plaintiff moved the trial court to discharge the jury, and render judgment in his favor, which motion being denied, a verdict was returned in favor of defendant. The plaintiff immediately moved for a new trial, and for judgment notwithstanding the verdict. Before the motions were passed upon, the motion for a new trial was withdrawn and the plaintiff's rights were submitted upon the motion for judgment, which the trial court denied, entering the judgment upon the verdict. On appeal this court reversed the judgment of the trial court, and remanded the cause with directions to enter judgment for plaintiff for the amount due.

Was respondent entitled to a directed verdict and judgment of dismissal at the time defendant interposed its challenge to the sufficiency of the evidence? Without passing upon the defenses of fellow servant or assumption of risk, we think the final judgment was justified for the reason that appellant's evidence shows the accident to have been the direct result of his own negligence. Madison Street, wide and well paved, running east and west, is intersected by Boylston and Broadway, parallel

streets, running north and south one block apart, Broadway being east of Boylston. According to appellant's own evidence, he drove north on to Madison street from Boylston avenue, and proceeded east on the south side of Madison, traveling at a moderate gait, with his horse under full control. About the same time, Hi Glass, coming south on Broadway at a moderate gait, turned into Madison towards the west. Having a heavy piece of furniture to deliver at a house on the south side of Madison, a short distance from Broadway, he, Glass, drove directly across Madison and was in the act of backing his van up to the curb when the collision occurred. Without detailing the evidence, we find that appellant, without reason or excuse, attempted to drive between the large van and the curb, when as a careful driver he should have known he could not do so, and at a time when he, having full control of his horse, could either have halted or have driven out upon the street and passed in front of Glass's team and van, there being no obstructions anywhere in the street. The accident occurred late in the afternoon, when appellant was making his last delivery, and he simply appears to have taken unnecessary chances in order that he might proceed more quickly to the completion of his day's labor. We fail to find any evidence showing negligence on the part of Glass. As said in *Larson v. American Bridge Co., supra,* respondent was entitled at the trial to have its challenge to the evidence sustained, and is still entitled to it. The trial court committed no error in sustaining respondent's motion *non obstante verdicto.*

The judgment is affirmed.

Mount, C. J., Root, Rudkin, Dunbar, Fullerton and Hadley, JJ., concur.

This case, we respectfully submit, makes clear that our motion for judgment, notwithstanding the verdict, should be granted, and the opinion should be so modified as to

direct the trial court to enter a judgment in favor of the plaintiff in error for the relief demanded in its complaint.

The case has been tried twice and has been twice in this court. The evidence is all before the Court, and we submit that as the defendant in error failed to produce any evidence sufficient to take the case to the jury, the litigation should end, and the plaintiff be given the judgment to which it is entitled.

Respectfully submitted,

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